# FEDERAL REGULATION OF RAILWAY RATES

BY

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## PREFACE

This series of books owes its existence to the generosity of Messrs. Hart, Schaffner, and Marx of Chicago, who have shown a special interest in trying to draw the attention of American youth to the study of economic and commercial subjects, and to encourage the best thinking of the country to investigate the problems which vitally affect the business world of to-day. For this purpose they have delegated to the undersigned Committee the task of selecting topics, making all announcements, and awarding prizes annually for those who wish to compete.

In the year ending June 1, 1906, the following topics were assigned:

1. To what extent, and by what administrative body, should the public attempt to control railway rates in interstate commerce?

2. A just and practicable method of taxing railway property.

3. Will the present policy of the labor unions in dealing with non-union men, and the "closed shop," further the interests of the workingmen?

4. Should ship subsidies be offered by the government of the United States?

5. An examination into the economic causes of large fortunes in this country.

6. The influence of credit on the level of prices.

7. The cattle industry in its relation to the ranchman, feeder, packer, railway, and consumer.

8. Should the government seek to control or regulate the use of mines of coal, iron, or other raw materials, whose supply may become the subject of monopoly?

9. What provision can be made for workingmen to avoid the economic insecurity said to accompany the modern wage-system?

A First Prize of One Thousand Dollars, and a Second Prize of Five Hundred Dollars, in cash, were offered for the best studies presented by Class A, composed exclusively of all persons who had received the bachelor's degree from an American college in 1894 or thereafter.

The present volume was awarded the first prize.

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# INTRODUCTION

## BASIS FOR THE DEMAND FOR FEDERAL REGULATION OF RAILWAY RATES

No question is exciting more animated discussion in America to-day than the railroad problem. Indeed, only the utter lack of unanimity among students of this question, as well as among the people at large, together with the newness and importance of the economic and social issues involved, justifies the publication of anything further upon a subject which has already called forth a number of volumes, and has been for several years a leading topic of discussion in our magazines and newspapers. Mainly because the settlement of this question, one way or another, so vitally affects every one's personal interests, it has made slow progress toward solution. The railroad problem does not readily lend itself to unemotional laboratory methods. Railway rates are of vital importance in every sphere of business activity. As one factor in production, transportation claims no inconsiderable share of the proceeds of almost every commodity offered in the market. Comparative railway rates may be the factor determining whether great cities shall flourish or decay, and frequently the future of whole sections of the country depends upon slight differentials in rates.

Ordinarily, where such tremendous issues are at stake, the public can be enlightened only through bitter experience. Nevertheless, it is to be hoped that there is a growing disposition at the present time to substitute reason for prejudice, and logic for passion. Certainly it is a legitimate function of the impartial investigator to strive to avert, so far as possible, the disasters which are so frequently involved in hasty and unwise political or social experiments.

What then is the basis of the demand for public regulation of railway rates? Complaints against the existing system of railway tariffs are many and varied, some being founded upon real tangible grievances, while others are the result of those occasional hardships incidental to all forms of progress. So frequently have these complaints been reiterated, during the past two years, that it is necessary to mention only the more important of them.

In the first place, it is alleged that railway rates in general are higher than they ought to be. Secondly, it is contended that rates vary unequally between different localities and classes of commodities, certain industries and sections of the country being placed at a disadvantage with respect to others, at the discretion of irresponsible, gain-seeking railway magnates. Finally, complaint is made that railway charges vary unequally between individuals, the large shipper by resort to various devices being accorded special advantages over the small shipper.

We shall take up each of these allegations and examine it with a view to determining whether it is based upon a fair ground of complaint, or upon conditions which must be characterized as legitimate. In each case we shall discuss the efficacy of closer governmental control of rates as a remedy for whatever evils are found to exist. Further, general considerations upon the subject of state regulation will be introduced, together with a discussion of some new problems to which state regulation must give rise. This discussion is followed by a consideration of the Interstate Commerce Law and of its interpretation by the Interstate Commerce Commission, and by the courts; finally a plan is proposed for governmental control, which, in our judgment, will mean an interference with the natural economic order only so far as such interference will promote the permanent interests of the country as a whole.

# FEDERAL REGULATION OF RAILWAY RATES

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## CHAPTER I

### ARE AMERICAN RAILWAY RATES EXCESSIVE?

One hears so much about railway extortion and excessive charges, that, without a personal investigation of the subject, one might readily infer rates on American railroads to be much higher than they should be, and government regulation to be necessary in order to scale down the exorbitant profits unjustly taken from the public and pocketed by unscrupulous railway managers and owners. Alleged extortion is one of the most serious complaints against the railroads. Yet when we come to examine the individual cases of those who complain most of excessive charges, we shall in nearly every case find that the real cause of complaint is not that rates in general are too high, but that the individual in question is compelled to pay a rate higher than he thinks fair in proportion to rates paid by some other individual, either of the same or of another locality. Since these latter points will be fully discussed in the second chapter, we shall for the present confine ourselves to a consideration of the argument that rates in general are excessive.

In order that we may come to a correct conclusion in regard to this matter, it is necessary that we seek some standard of comparison which will enable us to judge of the reasonableness of present rates upon American railroads.

It is to be noted at the outset that not even the severest critics of the railroads maintain that railway rates are high

in proportion to the cost of other means of transportation. On the contrary, owing to their lower charges, railways have practically superseded all other forms of inland transportation; even such natural highways of commerce as rivers and lakes have shown themselves scarcely able in competition to retain a small portion of traffic.

Nor are American rates high in proportion to rates paid in foreign countries. With the possible exception of India, rates on American railroads are the lowest in the world. This will appear from the comparative rates paid in several countries given in the following table for the year 1902:

| | | |
|---|---|---|
| Germany, | average rate per ton-mile | 1.42 cents |
| Austria, | | 1.16 |
| France, | | 1.55 |
| Hungary, | | 1.30 |
| Italy, | | 1.58 |
| United States, | | .757 |

In England the only road publishing intelligible statistics is the London and Northeastern, which reports an average revenue of 1.93 cents per ton-mile on minerals, 2.94 cents per ton-mile on live stock, and an average of 2.32 cents on all other kinds of traffic.

These statistics show average rates on most European railways to be more than double those which prevail in America.

It may be objected that conditions from country to country differ so as to make comparative rates of little significance. There is some ground for this objection. The points of difference are indeed so varied that it is practically impossible to take all of them into consideration. Nevertheless, on analysis it will be found that in important respects they tend to offset one another. Therefore, they are in error who dismiss arguments based on comparison of American with foreign rates by citing the fact that traffic conditions are in some respects altogether dif-

ferent. The proper method must be to inquire into these differences, and to assign to each, as nearly as possible, its proper weight. After this has been done the resultant will furnish a basis for comparison, which, though necessarily inaccurate, will nevertheless be significant, especially if the discrepancy of rates shall prove to be so glaring that it cannot be accounted for as due to inaccurate methods used in determining the basis for comparison. It is, therefore, in order to take up the more important differences in traffic conditions prevailing in Europe and America respectively, to determine whether there are not neutralizing elements of advantage or disadvantage.

By far the most important factor tending to produce lower rates in America is the longer haul. The average distance which a ton of freight is carried in America is nearly four times the average haul in England, and nearly double that of France and Germany. Naturally enough, the rate per ton-mile is less on freight that is carried from 150 to 200 miles than on that which is hauled 50 miles or less.

Another consideration of great weight is the lower cost of service in America, due to the remarkable ingenuity of Americans in discovering the easiest and least expensive way of performing a given amount of work. Thus in America we find freight-cars and engines more than double the capacity of those used in Europe. Trainloads of from 2000 to 2500 tons are therefore quite common in America, while in Europe trainloads rarely exceed 600 or 800 tons.

Again, European railways, on the whole, carry a somewhat higher grade of traffic than do American railways. And yet, when comparison is made of rates on similar grades of traffic, American rates are found to be as much lower than foreign rates as the general averages would indicate. Only upon short-distance, non-competitive traffic do American rates at all approximate European rates.

Some European railways, it is true, furnish free delivery to the door of the consignee, but, as a rule, this applies only to a small portion of the higher grade traffic, while such articles as grain, hay, live stock, coal, and other minerals, which form the bulk of the traffic, are delivered only on track, as in this country.

These important considerations are, however, offset by others of almost equal weight, tending to produce lower rates in Europe.

First may be mentioned the fact that a much lower level of wages and prices prevails in Europe.[1] Thus in spite of our better machinery the cost of production of many commodities is so much lower in Europe that European manufacturers, handicapped as they are by a tariff wall ranging from 20 to 100 per cent, have found themselves able to compete in supplying our home market with many commodities which we ourselves produce at greater cost. If, then, Europeans are able to produce other commodities cheaper than we, why should they not also be able to furnish transportation at a lower cost? Not only do the lower wages prevailing in Europe tend to reduce the cost of operation and of maintenance, but they have been a most important factor in diminishing the initial expense of building the railroads. Many American railroads were in the beginning laid out through an almost unbroken wilderness, where, though there was practically no expense in

[1] The following is a comparison of the wages paid to certain forms of railway labor:

| | Trackmen | Engineers | Firemen | Conductors | Trainmen |
|---|---|---|---|---|---|
| The United Kingdom | $.73 per day | $1.62 | $ .91 | $1.22 | $ .85 |
| Belgium | .48 | 1.01 | .72 | 1.08 | .72 |
| Germany | .57 | | | | |
| France | .52 | | | | |
| Italy | .42 | | | | |
| Russia | .29 | | | | |
| United States | 1.31 | 4.01 | 2.28 | 3.38 | 2.17 |

(See Bulletin of the Department of Labor, No. 20.)

obtaining a right of way, the cost of transporting materials and of carrying on the work was enormous.

Another consideration of great weight is the greater density of traffic which prevails on most European railways. It is a commonplace in railway economics that, wherever the traffic is dense, goods may be carried at a rate much lower than it is possible to make where the traffic is light. In fact, where roads are already provided with a full equipment, the additional expense of handling additional units of traffic may be comparatively trivial. The following table gives density of traffic upon European and American railways for the year 1902:

| | |
|---|---|
| United States, tonnage per mile of line, | 793,351 [1] |
| France, | 600,300 [2] |
| Germany, | 1,090,600 [3] |
| England, | 1,150,000 [4] |

Thus it appears that the conditions which tend to produce low rates in America are offset by circumstances of almost equal weight which should tend to produce low rates in Europe. It would seem, therefore, that so far as the more important economic and physical conditions are concerned, rates in Europe should be nearly as low as those which prevail in America. The vast discrepancy which does in fact exist must, therefore, be assigned to other causes, and among those causes the most potent are, without doubt, the comparative lack of competition and the stifling of private initiative in European communities through governmental interference.

If, however, our average rates are low in comparison with average rates in other countries, is there not some other standard by which they may be adjudged to be too high? Are not rates on American railways, it may be asked, higher to-day than they have been in the past?

[1] *Report of the Interstate Commerce Commission for* 1903, p. 112.
[2] *Archive für Eisenbahnwesen*, 1905.
[3] *Ibid.*
[4] Estimate.

And this question brings one to a consideration of the most plausible and effective charge against American railroads. There has been in fact a considerable advance in rates within the last few years, and if it can be shown that rates have been arbitrarily and unreasonably advanced during this period, a most effective point will have been scored against our present rate-making system. A comparison of present rates with those which have prevailed in the past is necessary to determine whether present rates may be justified upon reasonable grounds.

No one contends that rates are high to-day in comparison with rates of fifteen or twenty years ago. In fact, when long-time periods are taken into account, it is found that there has been a remarkable decline in American rates, — a decline such as has been witnessed in no other country. The following table shows the general course of rates in the United States for the past thirty-five years:

| Year. | Average rate per ton-mile. | Year. | Average rate per ton-mile. |
|---|---|---|---|
| 1870 | 1.99 cents. | 1899 | .724 cents. |
| 1882 | 1.24 | 1900 | .729 |
| 1887 | 1.03 | 1901 | .750 |
| 1892 | .896 | 1902 | .757 |
| 1897 | .798 | 1903 | .763 |
| 1898 | .753 | 1904 | .780 |

The decline in the average rate per ton-mile in thirty-five years has been 1.21 cents, or nearly 60.5 per cent. The increase from the lowest point in 1899 to the highest point attained since that time in 1904 has been .056 cent per ton-mile, while the percentage increase has been but 7.7.[1]

The general course of rates has, therefore, been rapidly downward in the United States. In European countries generally, on the other hand, where government interference has been more minute, the decline of rates has

[1] In 1905 the average rate per ton-mile was only 7.66 mills, representing a decline of 2.05 per cent as compared with the rate of 1904, and an advance of only 5.8 per cent over those of 1899. The passenger rate for the year 1905 was only 1.962 cents per mile, which is the lowest average rate yet attained in the history of this country.

been during this period comparatively insignificant. In France, where every rate made by the railroads must be approved by a government commission and by the Secretary of the Interior before it can be enforced, there has been practically no decline during the period in which the decline in America has been rapid. In 1870 the average rate in France was 1.625 cents per ton-mile. In 1903 it had fallen to 1.55 cents, an absolute decline of only .075 cent as against a decline in America during the same period of 1.22 cents, while the percentage decline in France has been but 4.3 per cent as against 60.5 per cent in the United States. In fact, the opinion of all experts is unanimous that to whatever cause it may be due, the decline in American rates has been nothing short of phenomenal.

It must be admitted, nevertheless, that there has been a considerable advance in American rates since 1899, when the lowest point was reached. Is not this advance easily accounted for, however, when one takes into consideration the prosperity which the country has enjoyed since that time? Railway stockholders, and many bondholders as well, were heavy losers during the period of depression which preceded 1899, and should railway capital be denied the privilege of recuperation, which all other forms of capitalistic enterprises enjoy during periods of prosperity?

However, it is not the slight advance of rates but the increased amount of business which has made the railways, within the last few years, comparatively prosperous. At the same time, coupled with the general prosperity which has attended the increased amount of business done has come a considerable rise in the prices of nearly all commodities, while there has occurred also a considerable advance in the rate of wages. For these reasons the cost of operation upon our railroads has been greatly increased.

Whatever the cause, the fact of this rise in the price of services and commodities is incontestable. In other words,

a smaller quantity of labor and materials can be purchased with a given amount of gold coin to-day than could be purchased six years ago. To prove this fact we have but to glance at the three best tables of American prices. In each table the percentage basis is the average of the same table for the ten-year period 1890 to 1900, and for comparison we have averaged the index numbers for the five-year period 1895 to 1899.

The tables of the United States Bureau of Labor embrace 260 important commodities, of which the average wholesale prices for the year are computed on the basis of the average quotations upon the first day of each month. According to this table the average of the index numbers for the five-year period 1895 to 1899 is 93.6, while for the year 1905 the index number is 115, showing an advance of 24 per cent.

Bradstreet's tables embrace 100 articles of common consumption. Using the same method of computation, the average, according to his tables, is 93.72 for the period 1895 to 1899, and the index number for the year 1905 is 119.6, showing an advance of 28 per cent.

The tables computed by Dun apply only to the necessaries of life. According to these tables the average for the period 1895 to 1899 is 93.08, while the index number for the year 1905 is 116.6, showing an advance of 25.2 per cent.

These various tables, compiled independently, apply to the prices of different sets of commodities. It is remarkable that their results should be so substantially similar. This evidence establishes beyond any reasonable doubt the fact of a considerable advance of prices. But a general advance in the prices of commodities, according to another way of stating the same fact, is only a relative decline in the value of that standard in which prices are measured. When measured in the amount of commodities and services which it will buy, gold has therefore declined about 25 per

cent in value since the period 1895–1899. Would it then be unreasonable to expect that gold, being less valuable for the purchase of commodities and labor, should also be less valuable in the purchase of transportation? What are the facts? If we take similar periods for the computation of average railway rates, we find that there has been no advance whatever, the average rate for the first period, 1895–1899, being 7.84 mills per ton-mile, while that of 1904 was only 7.80 mills per ton-mile. Thus while average prices have advanced 25 per cent, there has actually been a slight decline in average railway rates.

It will be noted that we use the average rate for 1904 instead of that for 1905, as in the case of prices. This would by no means be a fair basis for comparison were it not for the fact that the indications are that the average rate for 1905 when published will be found to be much lower than that for 1904. The past year has been marked by many severe rate-wars, by drastic reductions on the part of State Commissions, and by comparatively few advances.[1]

An important distinction is here to be indicated which is not often recognized. There are two sorts of rates, which may be designated respectively as nominal and real. Nominal rates are measured in money, while real rates consist of a percentage of the value of the commodities transported. To determine the real rate, that proportion of the value of the goods transported, which must be given for the service of transportation, must be ascertained.

This distinction may at first seem useless, and the method of computing real rates certainly refuses to lend itself to exact statistical analysis. Nevertheless, real rates,

[1] The above forecast has proved correct. According to the Statistics of Railways published by the Interstate Commerce Commission, the average rate per ton-mile for 1905 was only .766 cent. The indications now are that the report for 1906 will show still further reductions, thus practically wiping out the advance which has occurred since 1899. On the other hand, prices have been rapidly advancing, to the extent that the tables for 1906 show an advance of nearly five per cent over those of 1905.

such as described, are the only proper measure of the relative burden of transportation charges upon the industries of our country. Obviously it is of little concern to the producer just what may be his absolute money income and expenditure. That which is of especial interest to him is his relative income and his outlay. It is, therefore, the proportion of the value of his wheat which must be paid for its transportation that determines the real burden of the transportation charge upon him. On the other hand, it is the amount of labor and of materials which the money received for transportation will buy which is of interest to the railroad in determining whether or not it can derive a profit from the rates charged. If now real rates are accepted as the proper basis for determining the course of rates in this country the whole situation assumes an entirely different aspect. The tables given above show that the proportion of goods of all kinds which had to be given for their transportation in 1905 was about 25 per cent less than during the period 1895 to 1899. In other words, real rates have declined 25 per cent in less than ten years.

This fact may be verified by a comparison of rates and prices upon almost any important commodities. The following table shows the decline in the rates on grain: [1]

| Year | Average prices. Wheat per bu. | Oats per bu. | Corn per bu. | Average rate per bu. Chicago to New York Export rates By lake and rail | All rail |
|---|---|---|---|---|---|
| 1895 | $.509 | $.199 | $.253 | $.0695 | $.1217 |
| 1896 | .726 | .215 | .249 | .0732 | .120 |
| 1897 | .808 | .187 | .263 | .0737 | .1232 |
| 1898 | .582 | .255 | .287 | .0496 | .1155 |
| 1899 | .584 | .212 | .303 | .0663 | .1113 |
| Average | .640 | .219 | .271 | .0664 | .1183 |
| 1900 | 619 | .258 | .357 | .0505 | .0908 |
| 1901 | .624 | .379 | .605 | .0557 | .0902 |
| 1902 | .630 | .307 | .403 | .0578 | .0875 |
| 1903 | .695 | .341 | .425 | .0617 | .0889 |
| 1904 | .924 | .313 | .441 | .0502 | .0847 |
| Average | .699 | .329 | .446 | .0552 | .0884 |

[1] *United States Statistical Abstract*, 1904.

Thus during the first period, 1895 to 1899, one bushel of wheat would purchase the transportation of 5.4 bushels, while during the period 1899 to 1904, one bushel of wheat would purchase the transportation of 7.9 bushels. One bushel of oats would purchase the transportation of 1.9 and 3.7 bushels in the two periods respectively, while one bushel of corn would purchase the transportation of only 2.3 bushels in the first period, but more than 5 bushels in the second. Even more striking results may be obtained if we take the through export rates from St. Louis, Kansas City, or Duluth. Thus we find that there has been a decline of from 32 per cent to 51 per cent in the real rates on grain. As we shall see presently, there has been a similar decline from the railroad point of view, since the money which is received for transportation will buy less labor and materials than it would five or ten years ago.

Even if we take the rate for the year 1899 as a basis for comparison, instead of the averages for the two five-year periods, we still have a decline of more than 17 per cent in the real rates since that year. The use of the year 1899 as a basis for comparison is, however, manifestly unfair. During that year the railway revenue per ton-mile was the lowest in the history of this country. Furthermore, the year 1899 was marked by more disastrous rate-wars than any other period since the eighties. It was in order to protect themselves from these rate-wars that the railroads made such rapid progress toward consolidation during the two succeeding years. Then, too, the years 1898 and 1899 were marked by more secret rebates and departures from the published rates than any period since 1887. This point is substantiated by the following quotation from the Report of the Interstate Commerce Commission for 1898, which was reprinted in the Report for 1899:

> Tariffs are disregarded, discriminations constantly occur, the price at which transportation can be obtained is fluctuating and uncertain. Railroad managers are distrustful of each other, and

shippers are all the while in doubt as to the rates secured by their competitors. . . . Enormous sums are spent in purchasing business, and secret rates are accorded far below the published charges. The general public gets little benefit from these reductions, for concessions are confined mainly to the heavier shippers.

The only comment necessary upon the foregoing statement is that every such secret reduction tended to reduce the average revenue per ton-mile, which is necessarily computed upon the basis of the rates actually charged rather than upon what would have been collected if the published tariffs had been enforced upon the entire amount of traffic. Since the passage of the Elkins Law, however, these secret rebates have rapidly diminished. With the quotation cited above, compare the following from the Report of the Commission for 1904:

Without further reference to the changes effected by this amendatory legislation [the Elkins Law], the Commission feels warranted in saying that its beneficial bearing became evident from the time of its passage. It has proved a wise and salutary enactment. It has corrected serious defects in the original law, and greatly aided the attainment of some of the purposes for which that law was enacted. No one familiar with railway conditions can expect that rate-cutting and other secret devices will immediately and wholly disappear, but there is a basis for confident belief that such offenses are no longer characteristic of railway operations. That they have greatly diminished is beyond doubt, and their recurrence to the extent formerly known is altogether unlikely. Indeed, it is believed that never before in the railroad history of this country have tariff rates been so well or so generally observed as they are at the present time.[1]

If it is true that the practice of giving secret rebates is becoming much less common, we are brought to the conclusion that the advance in nominal rates, since the year 1899, may largely be accounted for by the withdrawal of the large number of secret concessions from the published

[1] This broad statement has been somewhat modified by more recent Reports of the Commission.

rates which has taken place since that time. In other words, the advance of rates has been an advance in the special rates obtained by large shippers rather than an advance in the published rates. The enforcement of the published tariffs has tended to increase the average receipts per ton-mile without a corresponding increase in the published rates. The advance in the published rates has therefore been much less than the average rates per ton-mile would seem to indicate.

The following statistics show the decline in the real rates which has taken place from the standpoint of income and expenditure to the railways: The increase of gross receipts of railways for the year 1902–1903, which was due to the increase of rates since 1899, was $67,556,299. The increase in the cost of labor, due to the advance in the rate of wages, was $40,373,501, while the increase in the cost of fuel, due to an advance in its price, was over $41,000,000. Thus the increase in the cost of these two items alone was 20 per cent greater than the additional revenue derived from the advance in the nominal rates.

Following is a table of the average prices of the two principal materials used by the railroads: [1]

| Year | Steel rails, per ton | Coal, per ton |
|---|---|---|
| 1895 | $24.33 | $2.00 |
| 1896 | 28.00 | 2.25 |
| 1897 | 18.75 | 1.80 |
| 1898 | 17.62 | 1.60 |
| 1899 | 28.12 | 2.00 |
| Average | 23.30 | 1.93 |
| 1900 | 32.29 | 2.50 |
| 1901 | 27.33 | 2.50 |
| 1902 | 28.00 | 2.50 |
| 1903 | 28.00 | 3.75 |
| 1904 | 28.00 | 2.25 |
| Average | 28.72 | 2.70 |

One dollar received by the railroads for transportation during the first period, 1895 to 1899, would, it appears,

[1] *United States Statistical Abstract*, 1904.

buy about 24 per cent more steel rails and 40 per cent more coal than in the five-year period since 1899. The following table gives the prices of some other materials which enter into the expenses of railway operation:

| | 1899 | 1903 | Increase |
|---|---|---|---|
| Railway ties, each | $ .43 | $ .54 | 24. % |
| Track bolts, per cwt. | 1.80 | 2.75 | 52.7 |
| Wire, barbed, " " | 2.25 | 3.05 | 35.5 |
| Bar iron, per ton | 22.00 | 36.00 | 63.6 |
| Cast iron pipe, per ton | 15.40 | 32.00 | 107.00 |
| Lumber, per 1000 ft. | 18.50 | 23.25 | 25.6 |
| Car wheels, each | 5.85 | 8.60 | 47.00 |
| Locomotives, each | 9000.00 | 15000.00 | 66.6 |
| Labor, trackmen per day | 1.18 | 1.31 | 12.9 |

From the above table it will be seen that the advance in the prices of many of the principal railway materials has been even greater than the advance in average prices of other commodities. From the railway point of view, therefore, the decline in real rates has been even greater than from the standpoint of the general public.

One other point remains to be considered under this head. There are those who would readily admit all the preceding arguments, who, nevertheless, would insist that rates have not declined as rapidly as they should. They urge that the many improvements which have been adopted since 1899, the increase in the trainload, and the enormous increase of the traffic, have enabled the railroads to reduce expenses of operation out of all proportion to the decline in rates. They insist that the public has been deprived of its fair share in the advantages accruing from the growth of business, and from the introduction of many modern labor-saving improvements.

That there have been many such improvements adopted, that the total amount of traffic has been greatly increased, and that the public is entitled to a portion of the advantages which accrue from these changes may be admitted. But is it true that these ameliorations have been sufficient to offset the advance in prices of materials and labor so

that there has actually been a decline in the relative expenses of operation during the last few years? On the contrary, statistics show that operating expenses have been increasing much more rapidly than net income.

In 1899 the proportion of operating expenses to gross income from operation was 65.24 per cent, while in 1904 it was 67.79 per cent. At the same time the proportion of net income from operation to gross income fell from 34.76 per cent to 32.21 per cent.[1]

If we let A and A′ represent the proportion to gross income of operating expenses for the years 1899 and 1904 respectively, and B and B′ the proportion of net income to gross income for the same years, we have: $\frac{A}{B} : \frac{A'}{B'} :: 1.875 : 2.146$. Thus in the relation of the two items operating expenses have gained about 14 per cent on the net income.

In 1899 the average cost of running one train one mile was $.98, while in 1904 it had risen to $1.31, showing an increase of 33.7 per cent.[2] In 1899 the gross receipts per train-mile were $1.50, while in 1904 they were $1.94, an increase of 29.2 per cent as compared with an increase of nearly 34 per cent in the cost of operation. At the same time the increase in net revenue per train-mile was only 12 cents, or 23.1 per cent. Thus the percentage increase in net revenue per train-mile was nearly one third less than the increase in operating expenses.

Nevertheless, net revenues of the railroads have been considerably augmented within the last few years. As we have already shown, this has come as a result of the

[1] These statistics are not conclusive owing to our inability to estimate accurately the amount which has been spent in permanent improvements and charged to operating expenses. The statistics for 1905, which have just been published, show a slight decrease in the proportion of operating expenses.

[2] The operating expenses as here used include the cost of maintenance, but no part of the fixed charges. (See *Statistics of Railways of the United States* for 1899 and 1904.)

general prosperity of the country, and of the great increase in the amount of business rather than from the slight advance of rates which has occurred. Every indication tends to confirm the belief that the present boom period is of a temporary character, and railroads are justly entitled to share in the general prosperity along with other industries in order that they may indemnify themselves for losses sustained in periods of depression.

In consideration of the point as to the reasonableness of American rates but one other possible standard remains to be considered. That is the relation of income to capital investment in railways. Do the railroads of the United States pay more than a fair return upon the amounts actually expended in their construction and improvement? Every one would readily admit that the individual who risks his capital in a railway enterprise, which is always more or less precarious, is entitled to a just compensation for the interest on his investment, and for the risk which he assumes; for if investors were to be deprived of the privilege of earning such returns, there would never be another mile of railway built in this country, which in the present state of our economic development would be disastrous. It is necessary, therefore, that we should examine the returns upon railway capital in order that we may determine whether or not more than a reasonable rate of interest has been paid upon such investment. If it can be shown that railway capital is not paying more than a reasonable return, we must conclude that the public is not justified in taking steps which will result in a material reduction in the returns upon that capital.

In order to obtain any accurate data by which to judge of the reasonableness of the returns upon railway capital, it is necessary to ascertain as nearly as possible the basis of the capitalization of the various railroads. Unfortunately the early dealings of most of our railroads are so shrouded in obscurity that accurate data for this

purpose are not obtainable. Even estimates of the relation of the present railway capitalization to the amount of capital actually invested are but little better than guesses. Nevertheless the general impression of the public is that American railroads are grossly overcapitalized, and that dividends apparently low are in fact enormous when compared with the amount of capital actually invested. It is true that this might have been the case at one time, if dividends had been paid at all, but the fact is that scarcely any of these overcapitalized roads paid any dividends whatever during the first decade or so of their existence. In the mean time a great deal of water was squeezed out of their capitalization, occasionally by reorganization, but more often by the gradual enhancement in the value of their tangible assets, by the advance in the prices of labor and materials, by the enormous increase in the value of the rights of way and terminal property, and by the gradual investment of earnings in permanent improvements. Therefore it cannot be doubted that the amount of water in the capitalization of American railways has been greatly reduced if not entirely eliminated.

It is generally admitted that there is little water in the capitalization of European railways. Yet the average capitalization of the railways of Europe is $127,696 per mile, while that of the American railroads is but $61,396. It must be borne in mind, however, that the railroads of England, and of some of the countries of Southwestern Europe, are in general much better constructed than those of America. The above average, however, includes the railways of the Scandinavian Peninsula and those of Russia, which are on the whole more poorly constructed than those of the United States. Then, too, as we have already noted, the labor used in the construction of American railways was nearly three times as expensive, and the price of many of the materials used was higher, though the cost of the rights of way was much less.

It is impossible to ascertain to just what extent, if at all, American railroads are overcapitalized to-day. Certain facts, however, must be borne in mind. In the early days of railway history, overcapitalization was absolutely necessary. The investor believed that the stock of a successful enterprise ought to go to par, and the difference between the amount paid for the stock and its par value represented to him what he considered to be a fair remuneration for the risk which he assumed. It would have been next to an impossibility to have induced the investors to pay the face value for a smaller amount of stock; for whatever may be the capitalization of a company, it is always easier to persuade the investor to take a large amount of stock at a low figure than it would be to induce him to take a smaller amount of stock at a higher price. In the more settled conditions of railway finance which prevail to-day the incentive to permanently maintain a state of inflated capitalization is not as great as it was in the early days of railroad history. For the past twenty years, therefore, most of our great railroad systems have been making large expenditures for permanent improvements and paying for them out of current revenue instead of charging them to capital account.

There is another fact which makes railway capitalization appear larger than it really is. The misapprehension arises from the fact that in the statistics showing the total capitalization of the railways of this country and the capitalization per mile of line, a considerable portion of railway capital is counted twice. Wherever one railroad owns a part of the stock or bonds in another, it usually increases its own capitalization sufficiently to cover this new asset. The stock which is so owned is thus represented in the capitalization of both companies. The dividends upon the stock thus held by another company are amalgamated into its general revenue, and are eventually again paid out in dividends upon its capital. Thus the total amount of

money paid out in dividends is in reality much smaller than it appears from the statistics. The amount of railway stocks and bonds owned by other railroads was, in 1904, $2,501,330,601,[1] or more than twenty per cent of the total railway capitalization. If this vast amount of stock were canceled, as it might properly be, in the statistics showing the total outstanding capital account of the railways, the actual capitalization per mile of line would be found to be nearer $45,000 than $60,000.

In order to make this point perfectly plain, let us assume a specific case. Let A and B represent two railroads of 2000 miles of line and a capitalization of $100,000,000 each. If A desires to purchase one half of the capital stock of B, it would probably issue a sufficient amount of its own stock or bonds to cover the necessary outlay. It would thus increase its own outstanding capital account by $50,000,000, but it would hold in its treasury $50,000,000 of the stock of B as the asset upon which the increase was made. The outstanding capital account of the two railways would then be as follows:

| | |
|---|---|
| Capital stock and bonds of A outstanding, | $150,000,000 |
| " " " " " B " | 100,000,000 |
| Amount of capital stock of B in treasury of A, | 50,000,000 |
| Total outstanding stock and bonds, | 250,000,000 |

Thus after this transaction we find that the total capitalization of the two roads has been increased by $50,000,000, while the average capitalization per mile of line has been increased from $50,000 to $62,500. In a transaction such as this there is no stock-watering whatever. The increase in capitalization is only nominal. Obviously the actual amount of securities upon which dividends must be paid from the earnings from operation has not been increased or decreased. The same amount of net revenue will

[1] In 1905 the total amount of railway stocks and bonds owned by other railways was $2,638,152,129, representing an increase of 5.5 per cent over 1904.

therefore pay the same rate of dividends upon the total capitalization as formerly.

Only, then, by excluding the amount of railway securities held by other railroads may we obtain a basis for determining the increase or decrease of railway capitalization relative to the value of the tangible assets, or to the number of miles of line. Using this method of computation we find that in 1880 the average capitalization per mile of main line was:

| | |
|---|---|
| Capital stock | $27,700 |
| Bonds | 25,400 |
| Total | $53,100 |

At that time there were 87,800 miles of railway in the United States, and 20,300 miles of second, third, and fourth track and sidings. In 1903 there were 207,000 miles of main line and 61,000 miles of auxiliary tracks. The capitalization per mile of line at that time was:

| | |
|---|---|
| Capital stock | $21,050 |
| Bonds | 23,700 |
| Total | $44,750 |

Thus the average capitalization per mile of line has decreased $8350, or 15.7 per cent. This has been accomplished in spite of the relative increase of more than thirty per cent in the number of miles of auxiliary tracks, the better ballast, the removal of curves, the cutting-down of grades, the boring of tunnels, the substitution of steel for wooden bridges, the heavier steel rails, additional signaling and other safety devices, the enormous increase in the number, size, and capacity of the locomotives and cars, more commodious stations and terminal facilities, greater comfort and speed for the traveling public, the elevation of tracks in some of the larger cities, and above all the enormous increase in the value of the rights of way and other railway property. In fact, it is believed by a large number of railway experts that the railroads of America could not be reduplicated to-day for a sum equal to their present capitalization.

If, then, we may assume that the capitalization of American railways is not at present greatly excessive, we must conclude that the returns which are now being paid upon that capital are on the whole very moderate. For twelve years, 1888 to 1900, an average of 63.94 per cent of American railway stock paid no dividends whatever. Even during the present era of prosperity 42.53 per cent of the total railway stock paid no dividends for the year 1904, while 4.49 per cent of the funded debt paid no interest. But during the period 1888 to 1900, the proportion of the bonds which paid no interest was much larger, and as a result of this fact, nearly all of our great railway systems, at one time or another, have been driven into bankruptcy, frequently resulting in an almost total loss to the stockholders. The following table will show the low returns which have been paid upon railway stocks since 1888: [1]

| Year | Per cent of stock paying no dividends. | Average rate paid upon all stock. |
|---|---|---|
| 1889 | 61.67 | 1.95 |
| 1891 | 59.64 | 2.25 |
| 1893 | 61.24 | 1.73 |
| 1895 | 70.06 | 1.65 |
| 1897 | 70.10 | 1.57 |
| 1899 | 59.39 | 1.95 |
| 1901 | 48.73 | 2.67 |
| 1903 | 45.94 | 3.19 |
| 1904 | 42.53 | 3.51 |
| 1905 | 37.16 | 3.57 |

There is certainly, therefore, no cause to complain that our railroads have paid an unreasonably high rate of dividends. If we assume that during this period 50 per cent or 60 per cent of the total capital stock was water, the average returns upon the actual capital would still be very small. We conclude, therefore, that the average returns upon railway capital have not been above the average returns upon other kinds of investment.

From every point of view, therefore, American railway rates are, in general, very reasonable. But from this fact

[1] *Statistics of Railways of United States*, 1904, p. 60, and 1905, p. 58.

alone we cannot derive a perfect guarantee for the future. It is a perilous thing to leave such vital interests as those of transportation unreservedly to the control of irresponsible private individuals. Economic causes have hitherto checked the greed of railway capitalists, but as certain forms of competition are becoming extinct, we have some grounds of apprehension for the future. As we shall subsequently show, however, that which is needed is adequate and expeditious machinery for preventing extortion and excessive charges, rather than a transfer of the responsibility of rate-making from the railroads to the government.

We shall now turn to a discussion of the relative inequality of rates in connection with which we shall find abuses which constitute a better foundation for the demand for public regulation.

## CHAPTER II

### FEDERAL CONTROL OF RATES IS NECESSARY

In the preceding chapter, it has been shown that the real ground of complaint against the railroads is not that rates in general are excessive, but that they are inequitable. One shipper or one locality is especially favored as compared with other shippers, or with other localities similarly situated; or one class of commodities is placed at a disadvantage, as compared with other competing commodities. In other words, railroads are charged with unlawful and unjust favoritism.

At first thought, it would appear that a good case might be made out against the railroads upon these grounds. Discriminations in rates are everywhere so apparent as to require no presentation of evidence to prove their existence. Upon investigation, however, it will be found that, aside from personal discrimination, cases of unjust favoritism on the part of the railroads are extremely rare. Railroads are not in business for the purpose of conferring special favors upon particular localities or individuals. Their aim is to secure the largest net revenue possible. In every case, therefore, they charge the highest rate which, in their opinion, is consistent with their permanent interests. If one locality obtains a rate lower than that given to another, it is usually not because the railroad wishes to favor that locality, but because it is unable to charge more without losing traffic to the extent that there would be a loss in net returns. Nobody would criticise the railroads, in any given case, for making their rates low enough to stimulate traffic sufficiently to give them greatest net returns. But

how about those other points, where rates are not reduced to the same extent? Obviously, the reason these rates are not so reduced is that the railroads cannot increase their net returns by a reduction. There must be, therefore, something inherently different in the nature of the business at the respective shipping-points. The former locality may have the advantages of water competition, it may have the advantage of the competition of several railroads, or it may possess great natural or acquired advantages for developing traffic and carrying on a given industry. Is it not, therefore, to be expected that the railroads, in their attempt to develop the largest amount of traffic possible, will recognize these natural and acquired advantages, and adjust their rates accordingly? There is no unjust discrimination against the locality which does not possess these advantages and is charged a higher rate, unless it can be shown that a reduction of rates to that point would be equally advantageous with respect to development of traffic. The only valid grounds of complaint, therefore, would be the enforcement of rates either excessive in themselves, or established as the result of capricious or unreasonable discrimination on the part of the railroads.

Upon close examination of the various complaints brought before the Interstate Commerce Commission, however, it will be seen that cases of capricious or unreasonable discrimination are extremely rare. Nine out of ten of the cases of alleged discrimination between the localities arise from the fact that certain local points do not possess the advantages of competition, such as may have resulted in a disproportionate reduction in the rates to some more favored competitive point.

Now what might be expected to result if the government were to undertake to equalize these natural and acquired advantages, and thus put the local points upon an equal footing with the competitive points? This could be accomplished only by one of two means: either

by raising through rates, or by reducing local rates. In the preceding chapter it has been shown that rates on American railways are not generally excessive, and that the returns upon capital invested in railways have been very moderate indeed. If, then, the returns upon such capital were substantially reduced below the present point, railway development in the future would be seriously crippled. Any serious reduction, therefore, in the local rates throughout the country, without a corresponding increase in the through rates, would tend to bring about such undesirable results. Would it then be advantageous to secure an advance in through rates, and if so by what means might that end be attained? These low competitive rates may be increased in only two ways. Either a minimum rate may be established, which would result in the destruction of the competition hitherto existing at the competitive points, or legislation may reduce the local rates, and drive the railroads themselves to combine in order to raise their through rates and thus prevent a complete annihilation of their profits. In fact it would be impossible for the government to secure an advance in any competitive rate without resorting to one or both of these means. In either case legitimate competition in rates is destroyed. It is very questionable whether such a result is desirable. In fact, the opinion of railway experts is almost unanimous that the great decline in the railway rates of this country has been brought about principally through the agency of competition. Even the most ardent advocates of government regulation admit that legislation could never have accomplished similar results, and, as we have already seen, the decline has been least rapid in those countries where legislation has been the most drastic.

Moreover the fixing of a minimum rate will be attended with evils of a peculiar nature. Not only does it destroy all legitimate competition, but it encourages and places a premium upon that competition which is illegiti-

mate. Legitimate competition, in many cases, has already reduced the rates to competitive points to so low a figure that additional reductions cannot be made with profit. Hence there is little inducement for the traffic manager, in such cases, to cut under the published charges by giving rebates, and the amount which he can give in rebates is necessarily limited by the narrow margin of profit. However, if the government should step in and raise a competitive rate of this character, there would no longer be any possibility of any competition in the published rates, and whatever rivalry to secure traffic still existed between the railroads would be directed to the giving of secret rebates, which would then have become profitable. Furthermore, the principle of fixing minimum rates, if put into practice, would lead to the very evils which are sought to be remedied. Suppose a minimum rate were established from Minneapolis to Chicago. Instantly all the roads leading from Duluth to Chicago, and those from all the other points competing with Minneapolis, would perceive their advantage and would make rates which would result in depriving Minneapolis and the Minneapolis roads of their share in the grain business. It would then be necessary for the Commission to fix a minimum rate from all these points to Chicago. Then some road would find that by shipping the grain on two bills of lading by some roundabout route, it could make a through rate which would enable it to secure the greater portion of the business. In such a case, it would be necessary for the Commission to fix a minimum rate to and from all of these intermediate points in order to prevent evasions of the law. Soon we would have a whole system of minimum rates, and legitimate competition in rates would be wholly destroyed. Then steamship lines, which are not subject to the act to regulate commerce, would step in and absorb a large portion of the traffic, which, under conditions of free competition, the railways would have been able to secure. The result would be that

we should soon have conditions somewhat analogous to those which prevail in France and Germany, where the railroads are practically prohibited from making rates which would enable them to compete with the water routes.

The absurdity of giving a commission the power to fix minimum rates [1] is so apparent that the subject would scarcely be worthy of notice were it not for the fact that that policy has received such strong support in so many influential quarters. The Commission itself has frequently asked for that power. The principle was advocated in the President's Message of December, 1904, and was subsequently embodied in the Esch-Townsend Bill, which came so near becoming a law. Till quite recently it was the programme of the Democratic minority in both the Senate and the House. It is argued that such a measure is the only means by which certain inequalities may be remedied. Let A and B represent two competing markets, served by two different railroads. If B obtains a rate which is proportionately lower than the rate to A, the citizens of A will complain that they are subjected to an undue disadvantage, since the railroads serving it do not meet the reductions to B. In order to remedy this discrimination, it would be necessary either to raise the rate to B, or to reduce the rate to A. But the rates to A may already be reasonable *per se*, and as the roads leading to that point have taken no part in the undue reductions to B there are no justifiable grounds upon which they could be compelled to reduce their rates. It is argued, therefore, that the only remedy for such a situation would be to raise the rate to B, which may appear unreasonably low, perhaps unprofitable. But what would be the result of such action? As already pointed out, the roads leading to A, and those leading to every other competitor of B, would immediately make rates which would deprive B of its business, since the roads at

[1] In the Hepburn Act as finally passed, the Commission is not authorized to fix minimum rates.

that point would no longer be able to protect their traffic by meeting these reductions. In the mean time, while all these other rates were being "fixed," irretrievable harm might result to B.

The foregoing arguments show that the elimination of many of the inequalities of rates which prevail to-day would be impossible without overthrowing the whole competitive system of rate-making under which the remarkable development of the resources of our country has taken place. But though the inequalities arising from natural or acquired advantages, or from railway competition, are generally of such a nature as not to admit of remedy, is it not true that there are cases of unjust and capricious discrimination which do require a remedy? Upon an examination of the complaints before the Interstate Commerce Commission, it will be found that such instances are in fact of infrequent occurrence. Yet cases of this kind have occurred and may occur again. Discrimination between localities may be used as a pretext for personal discrimination. Thus it was alleged in the testimony before the Industrial Commission that the apparently lower rates on oil from points where the Standard Oil refineries were located were made by the railroads in order to give those refineries an advantage over the independent refineries located at other points. It is altogether likely that, wherever no other disturbing factors appeared, these departures from the observance of the ordinary principles of rate-making were made with some such ulterior motives as alleged. Whatever influence the large corporations have over the railroads may be used to prevent the extension of equally low rates to points where their competitors are located. The inequality of rates which results is not a personal discrimination within the meaning of the law, yet as far as its practical effects are concerned, it amounts to the same thing. Of course no harm would result if the independent producer could move his plant to the more favored point

without loss, but this is impossible after large amounts of capital have been invested in specialized buildings and machinery. There should certainly be some means by which the government may correct discriminations which arise under such circumstances as these. But such discriminations are already unlawful under the Interstate Commerce Law, which forbids all forms of unjust discrimination between persons and places. What is needed, therefore, is a quick and effective means of enforcing the present law.

Another form of unjust discrimination between localities is that which frequently occurs where a railroad or its managers are personally interested in the development of some particular point. It is not infrequently the case that railway managers own elevator or other interests at some important grain centre. By extending especially low rates to that point, they are able to build up the business of that particular locality at the expense of other points, which, but for the difference in the rate, might be able to become strong competitors with the more favored point in carrying on the industry in question. Furthermore, as soon as the boom at the more favored point has reached its height, there is nothing to prevent the railway interests from selling out their property at inflated values, and then turning their attention to the development of some new point in which they may have become interested. There is no economic justification in discriminations such as these and they should be prevented. A common practice has been for railroads interested in Western lands to grant especially low rates on grain from points where their lands are located. They endeavor to build up those sections at the expense of other territory. The practice of granting especially low rates to certain points would not be an evil in itself, but frequently unreasonably higher charges are made to other points in order to force development into the particular channels which will be of personal profit to the railway managers. Any inequality of rates which cannot be justi-

fied from the standpoint of the railway as a common carrier, with no ulterior interests whatever, in the nature of things is an unjust discrimination, and therefore unlawful. If the railroads were prevented from making such discriminations as these, proportionately low charges would be made over the whole section, since the railroads would then find it to their interests to develop the whole country which they serve. On the whole, however, it must be admitted that cases of unjust discrimination between localities are extremely rare, and where cases of this character have been brought to the attention of the railroads, they usually remedy them at once, without formal proceedings upon the part of the Commission.

But there is another class of discriminations which are much more common and less often justifiable. Such are the discriminations between similar classes of commodities. Yet even in respect to discriminations of this character, a close examination will show that the great majority of cases which have been made the subject of protest are the result of legitimate competition. Attempt to remedy such discriminations would lead to the same difficulties as the attempt to do away with the discriminations between localities which arise from the competition of railroads or from peculiar natural or acquired advantages. If the higher rate were found to be reasonable *per se*, the only means by which the discrimination could be prevented would be through the destruction of that competition which had given rise to it, — an end by no means desirable. Thus in the recent decision handed down by Judge Bethea, of the United States Circuit Court, in the case involving discrimination between live stock and packing-house products from Missouri River points to Chicago, it was held that the lower rates on packing-house products were the result of legitimate competition. The Great Western had taken the initiative in a reduction of the rate on packing-house products, and the other roads

had been compelled to follow. The same forces had not operated to bring about a reduction in the rates on live stock, though these rates were shown to be quite reasonable in themselves. If a discrimination of this character were to be remedied, the remedy could be had only by a reduction in the rates on live stock, or by increasing the rate on packing-house products; that is to say in the one case, by depriving the roads of a fair return for their services, and in the other by destroying legitimate competition.

But still there are a large number of instances of such discrimination which cannot be justified on economic grounds. Thus a railroad, while making a low commodity rate on other rough lumber, placed railroad ties in the fifth class, thereby exacting a rate which was practically prohibitive upon the movement of that material.[1] The object of this discrimination was that the railroad, being itself a large consumer of railroad ties, wished to keep this material upon its own line, and to depress the price so that it could obtain it at a "reasonable figure" at such time as it saw fit. Of course the railroad took into consideration the fact that as the forests were being cleared away, material of little use but for railroad ties would be cut down with the rest, and as this material would not bear transportation, owing to the excessive rate applied to it, the railroad would eventually be able to buy up these ties practically at its own price.

There are only three conditions under which discrimination between similar classes of commodities may be justified. The first condition is met wherever competition has acted with peculiar force in reducing the rates upon one commodity more than another. An instance of this kind of justifiable discrimination is exhibited in the recent cattle case cited above.

[1] Thomas J. Reynolds *vs.* The Western New York and Penn. Railway Co., 1 Interstate Commerce Commission Reports, 393.

Secondly, discrimination between similar classes of commodities is justifiable when the higher charges are reasonable in themselves, and the lower charges are the highest which the traffic will bear. An instance of such discrimination is that which is frequently made between anthracite and bituminous coal. The Eastern roads charge a much higher rate upon the former than upon the latter. Yet upon most of the Eastern roads the rates upon anthracite coal are very reasonable, when considered apart from the lower rates upon bituminous coal, which, in most cases, barely exceed the cost of service. But if the rates on the latter were increased, the Eastern markets would cease to consume bituminous coal shipped from the West, but would draw their entire supplies from coal brought in by water from Canada or from other North Atlantic points. On the other hand, many roads west of Chicago charge a lower rate on anthracite than on bituminous coal. This results from the effort upon the part of the railroad to encourage the consumption of anthracite coal in the Western States, which, owing to the long distance which it must be transported, would otherwise be so expensive as to be beyond the reach of the ordinary consumer.

In the third place, discrimination between competing commodities may be justified on the ground that the cost of transporting one commodity is greater than that of the other. An instance of such justifiable discrimination is the common practice of charging less for furniture in the flat than in its finished state. It costs much less to handle the material in this form, and the railroads are therefore justified in making an allowance in the rate for this difference. In cases of this kind, however, there is no justification for a discrimination greater than the difference in the respective costs of service. While it might be impossible to compute absolute costs of service, the difference in relative costs may be computed with a fair degree of accuracy. The railroads should, therefore, be compelled to justify a discrim-

ination of this character by an actual difference in the assignable cost of service.

Unfortunately, as already pointed out in the case of the discrimination against railroad ties, many of the discriminations between similar classes of commodities cannot be justified upon any of these grounds. Discriminations of this character may result from personal favoritism on the part of the railway managers or from caprice. The same economic forces do not interpose to make fair dealing essential to the highest welfare of the railroad itself, as is generally the case in the settlement of differentials between competing localities. In fact, it is usually a matter of indifference to the railroads which of two competing commodities they handle, or whether they carry the goods in the raw or in the finished state, provided their total amount of traffic remains the same.

A common case of discrimination of this kind is that made between grain and grain products. It may be a matter of indifference to the railroads whether they handle the grain itself or the flour and the meal. And yet, slight differentials in the rates upon these two commodities may have tremendous effect upon the development of the industries of large sections of the country. A differential of a few cents would determine whether the flour-mills of Minnesota should thrive, or those of the State of New York, whether the corn-meal used in Texas should be ground in that state, or in Kansas, whence Texas draws its corn supply. Arbitrary changes in a differential of this kind may result in the destruction of millions of dollars' worth of fixed capital, and the building up of the industry in some other section without the slightest aggregate advantage to society as a whole. In all this the railroads themselves would lose nothing. In fact, they would gain by securing the traffic of carrying the men and materials necessary to build up the industry in the new section. In the very nature of things, it is unjust that the railroads, whose interest

in such cases is very slight, should have the final power of deciding such issues, while society, whose interests are so large, should have nothing to say.

Many instances of sudden and arbitrary changes in the differentials upon competing classes of commodities might be given, and frequently the public has suffered severe loss in property values as the result of such actions. Take the case of the recent advance in the rate on corn-meal from Kansas points to Texas.[1] For ten years the rate on corn-meal had been three cents higher than the rate on corn. On the basis of this differential the Kansas millers had found themselves able to compete with the Texas millers, and a large portion of the corn-meal used in Texas was ground in Kansas. In January, 1905, at the instigation of the millers of Texas, the Railroad Commission of that state announced a hearing for the purpose of determining whether intrastate grain-rates should be reduced. In order to prevent this, the railroads went to the millers and made a bargain with them. If the millers would agree to drop their complaint before the Texas Commission, the railroads, on their part, would advance the rate on corn-meal so as to exclude the Kansas millers from the Texas market. The bargain was carried out to the letter. The millers failed to appear before the Commission upon the date set for the hearing, and the grain-rates within the state were not reduced, while on the 19th of February, the railroads fulfilled their part of the contract by advancing the rate on corn-meal by an average of $5\frac{1}{2}$ cents per 100 lbs., without any corresponding increase in the rate on corn. The result

[1] Hearings of the members of the Interstate Commerce Commission before the Senate Committee, testimony of Charles A. Prouty, p. 18. See also: 11 I. C. C. Rep. 220. Upon April 15, the differential was reduced to five cents to all Texas points.

After an extended hearing upon the case the Commission decided that any differential exceeding three cents per 100 lbs. would result in undue prejudice to the shippers of corn-meal, and the roads were accordingly ordered to cease and desist from charging a differential in excess of that amount.

was that the Kansas millers were practically prohibited from shipping any corn-meal into the State of Texas. Thus the principal market of a very important industry of Kansas was swept away by the stroke of a pen. Not only will the Kansas millers lose, but the Texas consumers will lose also. Texas is unsuited for carrying on the milling industry. Mills were introduced into Texas more than twenty years ago. Yet the Kansas mills, handicapped as they were by a differential of three cents per 100 lbs., found themselves able to compete with the millers of Texas in supplying that market. The Texas millers have now secured the monopoly which they desired, and the Texas consumers will pay for it in the price of meal.

The Interstate Commerce Commission has frequently recognized the right of the railroads to charge a higher rate on flour and meal in proportion to the greater cost of service. Still the difference in the cost of handling these commodities is very slight indeed, since the extra work of loading and unloading flour is done by the consignor and the consignee. After the cars have once been loaded there is absolutely no difference in the cost of handling wheat and flour excepting, perhaps, a slightly greater terminal charge for flour. This difference seldom amounts to more than one cent per 100 lbs. The public has a right to demand that differentials of this character should not be arbitrarily increased where conditions do not warrant such increase.

On one occasion the railroads threatened to destroy the whole export flour industry of the Northwest.[1] The rates on wheat and flour had been the same for many years. Suddenly the roads advanced the rate on flour till they exceeded those on wheat by from four to eleven cents per 100 lbs. The result was that the exports of flour instantly fell off as compared with those of wheat. As long as these rates prevailed, the Western millers were

[1] In the matter of relative rates on export and domestic traffic in grain, and in grain products, see 8 I. C. C. Rep. 304.

entirely excluded from any share in the export flour trade. Not only did the milling industry of that section suffer, but also the resources of the country were weakened. Experts have declared that a most important factor in maintaining the fertility of the soil is the consumption of the by-products of the grain near the point of production. But if the wheat is exported instead of being ground in the Northwest, such products as the bran and the shorts are consumed in Europe instead of in this country as they would be if the wheat were ground at home.

If space permitted, many other instances of unjustifiable discrimination between grain and grain products might be given.[1]

Other cases of unjust discrimination between competing classes of commodities have been of frequent occurrence. Thus two kinds of soap, though substantially similar in price, bulk, and value, were carried at different rates.[2] In another case, common soap was carried at 33 cents per 100 lbs., while 73 cents was charged for pearline, a competitor of soap.[3]

Furthermore, Federal regulation is necessary to correct and prevent sporadic cases of extortionate rates. Wherever an industry has already been developed to its full capacity and enjoys large profits, owing to some special advantage which it possesses, there is nothing to prevent the railroad from demanding extortionate rates for the transportation of its product. In other words, the railroads, if unchecked by competition, are in a position to absorb the whole of what is termed economic rent, whether it be of location or of especial natural or acquired advantages.

[1] Board of Railroad Commissioners of Kansas *vs.* A. T. & S. F. Ry. Co., 8 I. C. C. Rep. 304. Hearings of the Interstate Commerce Commission before the Senate Committee, testimony of Commissioner Prouty, p. 7.

[2] Beaver & Co. *vs.* Pittsb. Cinn. & St. L. Ry., 4 I. C. C. Rep. 733.

[3] James Pyles & Sons *vs.* East Tenn. Va. & Ga. Ry. Co., 1 I. C. C. Rep. 465. Other cases of such discrimination will be taken up later. See Oil case, p. 174; also Window Shades case, p. 171.

It is extremely difficult to determine what is an extortionate rate. It is quite generally held that rates should bear a reasonable relation to the cost of service. But in any given case, it is altogether impossible to determine even with approximate accuracy the absolute amount of this cost of service. Even if it were possible to do this, it would not be easy to determine what proportion the rate ought to bear to the cost of service in any given instance. The question of whether a given rate is extortionate or not can only be determined upon broad grounds. Not only must the cost of service be taken into consideration, but the price of the commodity, the relative rates under similar conditions upon other lines, the possibility of the increase of traffic at a lower rate, the direction of the movement of empty cars, the density of the traffic upon the railroad, the earnings of the company, and every other circumstance which surrounds the traffic and is ordinarily taken into consideration in rate-making.

There is no distinct line of demarkation between what is a reasonable and what is an unreasonable rate. Every complaint must be decided upon its merits. It is necessary, therefore, that the body which has the power of determining such questions should be composed of men of absolute integrity, entirely free from all interested motives, and amenable as little as possible to political and sectional influence. There are certain reasons why the present Interstate Commerce Commission has been unable to attain this desired standard. These will be taken up in another connection.

It has been denied that cases of extortionate rates have been of sufficiently frequent occurrence to be worthy of any serious consideration, but it may well be doubted whether the present popular ferment against the railroads could have arisen without some substantial grounds. The very fact that more than two thousand cases have come before the Commission, where the railroads themselves

have practically admitted the injustice of the rates complained of by changing them in accordance with the petition of the complainant rather than stand trial, goes to show that most of these cases were such as ought to have been remedied. It cannot be inferred, however, that the railroads always remedy instances of injustice as soon as their attention is called to them. Cases frequently arise where stronger and more effective means are necessary in order to insure obedience to the law. Space will permit us to cite only a few such instances.

In one case the railroad made the rate on coal so high that independent operators were forced either to suspend or to continue in business at a loss.[1] In another case the rate on coal was nearly 25 per cent higher than the average rate upon all other kinds of traffic, though, according to the official reports of the company, the expense of handling the coal was much less than that of other kinds of traffic.[2] The reason for the existence of these anomalies was that in each case the railroad company itself owned and operated mines in the immediate vicinity of independent operators, and it wished to crush competition, so that in the end it might buy up the property of the rival producers at practically its own figure. In the mean time, the railroad itself would lose nothing, the amount of the rate upon the coal produced by itself or by its subsidiary companies being a matter of complete indifference to it.

Only by some adequate system of government control of rates may the industries of this country be protected from the danger of complete domination by the railroads. At any time they see fit to engage in an industrial enterprise, they may easily protect themselves from competition by putting the rates high enough to force out the independent producers. It has been seen how they have

[1] James C. McGrew *vs.* Missouri Pac. Ry. Co., 8 I. C. C. Rep. 630.
[2] Coxe Brothers *vs.* The Lehigh Valley R. R. Co., 4 I. C. C. Rep. 535.

in this way secured a practical monopoly of the great deposits of anthracite coal. One industry after the other might be thus similarly acquired till individual enterprise would be almost wholly lost, and the consumers of many of the necessaries of life would be practically at the mercy of various large corporations owning both the sources of supply and the means of access to them.

It has been suggested that such a danger may be averted by forbidding railroads to acquire industrial stocks, and a recent decision in Pennsylvania (the Chesapeake & Ohio Coal case, 200 U. S. 361) would seem to indicate that a railroad itself may not engage directly in the business of mining and selling coal. Such limitations might be effective as far as the corporation itself is concerned, but there is no law which could be devised which would effectively prevent railway managers and owners from individually acquiring such stocks, which to all intents and purposes would amount to the same thing as ownership by the railroad itself.[1]

[1] The Hepburn Act, as it finally became a law, attempts to prevent railroad ownership of industrial enterprises by making it unlawful for the railroad to transport the products of any industry in which it possesses an interest, direct or indirect. The section referred to is as follows:

"From, and after May 1, 1908, it shall be unlawful for any railroad company to transport from any State, Territory, or District of Columbia to any other State, Territory, or District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

A grave question at once arises as to the constitutionality of a provision of this character. Furthermore, it is extremely doubtful whether it will accomplish the purpose for which it is intended, even if it is upheld by the courts. To be sure it will probably prevent the direct ownership of industrial and mining enterprises by the railroads themselves, but it is doubtful if it will have any effect upon the holdings of industrial securities by railroad stockholders. The railroad itself as a corporation cannot be regarded as possessing any interest, direct or indirect, in an industry, simply because the owners of some of its shares may be also the owners of a considerable portion of the shares of some industrial corporation. To be sure the railroad policy might be dictated to suit the interests of

An instance of what appeared to be extortionate rates occurred a few years ago in the West. Though the rates on flour and grain in other parts of the country seldom average more than three fourths of a cent per ton-mile, rates several times as high were in force for some time from Kansas to Texas points, being in many instances as high as four cents per ton-mile.[1] When these rates were complained of, the railroads were unable to give satisfactory reasons for this apparent anomaly.

Again when Mr. James J. Hill was being examined before the Senate Committee, he pointed out that the rate on engines was lower over his lines from Philadelphia to Japan than it was over other roads for distances of less than five hundred miles. Upon being asked if he considered the latter rates excessive, he answered that he considered that they were at least twice as high as they ought to be.[2]

In another instance, we find a railroad charging a through passenger rate of ten cents per mile, though its net earnings were already excessive.[3]

Notwithstanding the large number of instances similar to those which have just been cited, it must be admitted

some of its larger shareholders. In fact, since the passage of this law, the railroads have been rapidly disposing of their industrial stock to new corporations composed almost entirely of their own principal stockholders. It is extremely doubtful whether the Federal Government would have the constitutional authority to do more in such a case than to insist that the rates charged by the railroad should be reasonable, and that it should give impartial service to all applicants.

The exception which is made for timber was probably for the protection of a few short lines in the timber districts, practically the whole of whose business consists in transporting the timber which is the product of their own sawmills. At any rate the railroads cannot complain that they have not been given plenty of time to dispose of their industrial stock and arrange their affairs in such a way as not to come into conflict with this provision.

[1] In the matter of alleged excessive rates on food products, see 4 I. C. C. Rep. 48.

[2] Hearings of the members of the Interstate Commerce Commission before the Senate Committee (1905), statement of J. C. Clements, p. 73.

[3] Board of R. R. and Warehouse Commissioners of the State of Mo. *vs.* The Eureka Springs Ry. Co., 7 I. C. C. Rep. 55.

that cases of extortionate rates are, perhaps, the least frequent of all the abuses of our present railway system. Up to the present time the railroads have been held pretty thoroughly in check by competition, and by the automatic limitations which result from their desire to develop the largest amount of traffic possible.

The restraining influence of competition is felt in a much wider field than merely that of parallel lines. In the first place, there is the competition of international markets. It is, therefore, to the interests of the railways of this country that they should make the rates on grain and other exportable materials low enough to enable the American farmers to compete with the producers of similar material in such countries as Argentine, Australia, or Eastern Russia. If the rates on such commodities should be permanently maintained at too high a level, the railways would lose a considerable portion of their traffic, which would probably result in a curtailment of their net revenue. Those railroads, therefore, which tap the wheat-producing regions of the Northwest as truly compete with the steamship lines to Argentine and Australia as they compete with one another. In the former case, however, the competition is of a broader and more permanent kind, and there is little probability of its elimination.

Secondly, there is the competition of markets and of producing areas within the United States itself. The railroads leading to the wheat-fields of the Northwest compete with those which tap the winter-wheat sections of Kansas and Nebraska. If a reduction in the rates from either district is not met by a corresponding reduction in the rates from the other, the development of the resources of the latter district would be greatly hindered, and hence the amount of traffic of the railroads serving it would fail to increase as rapidly as would otherwise be the case. Additional increments of capital and labor would flow to the more favored locality, and the equilib-

rium could be reëstablished only when the most available resources of one section should be exhausted, or when the old differentials in rates should be restored. Thus at whatever point an industry may be located, the railroads at that point compete with all the railroads throughout the United States which serve localities where similar industries, capable of supplying the same markets, are situated. Neither is there any immediate prospect that such competition will be eliminated. At any rate, it will exist till all the railroads and water routes combine into one gigantic monopoly.

It is not at all likely that the present generation will witness such an outcome.[1] The people would never submit to it. Such action by the railroads would invite government ownership, which would inevitably follow. Furthermore, such a combination would be extremely difficult under our laws as they now stand. Pooling is prohibited by the Interstate Commerce Act, and it has been held that illegal pooling consists of all agreements of whatever character which are made in restraint of competition.[2] The Sherman Anti-Trust Act forbids all combinations, of whatever nature, which in effect are a restraint upon interstate commerce, and provides severe punishment for any attempt to monopolize interstate commerce or any portion of it. The latter provision, if enforced, would no doubt cover cases of ordinary purchase where the intent was to secure a monopoly. The decision in the Northern Securities case shows how literally some of the provisions of this Act may be enforced.

Again, the interests of the railroads themselves check unlimited combination. After a certain point is reached, a railroad system becomes so large that its economical management as a unit becomes impossible. Thus many

[1] Just as this is going to press the tremendous purchases of the Union Pacific interests in the stock of the Illinois Central, the Chicago and Alton, and other lines, are exciting universal comment.

[2] The Interstate Commerce Commission *vs.* A. T. & S. F. Ry. *et al.* (132 Fed. Rep. 829).

of our large systems find it to their advantage to operate leased and purchased lines as separate systems. The amalgamation of three great railroads by the formation of the Northern Securities Company entailed no change whatever in the operating methods. Thus whatever advantage was to be secured was in the common financial management rather than in those savings which would ordinarily attend production upon a large scale. Then, too, the love of power and the personal rivalries of our great railway magnates would tend to deter them from subordinating themselves in any great railway combination, where each of these hitherto bitter rivals would be compelled to yield to the will of the majority, and where his personality would be almost wholly lost.

Finally, there is the competition of parallel lines; but this kind of competition, in many of the forms in which it has hitherto exhibited itself, seems to be rapidly disappearing. In the very nature of things, two different rates upon the same commodities, at the same time, and between the same points, are impossible. A railroad, therefore, has nothing to gain by a reduction in its published rates, for in such a case its rivals will immediately meet the reduction by similar cuts in their rates, so that the relative position of the first road would not be improved, though the absolute amount of the earnings of all the roads concerned would probably be diminished, owing to the lower scale of rates which would result. It is therefore absolutely necessary that these roads should come to some sort of an understanding, and that they should mutually endeavor to maintain whatever rates may be agreed upon. It is now only in exceptional cases that competing lines break away from these agreements for a test of strength in a rate-war. Yet experience has shown that whenever such wars have occurred, some of the reductions effected are usually permanent, the rates agreed upon at the end of the war being generally lower than those which prevailed previously.

Moreover, wherever there are many competing lines, an advance of rates is extremely difficult, for all the rival roads are not apt to agree upon the advisability of the advance, and if one road refuses to accede to it, the others can accomplish nothing. Likewise the managers of one road might believe that the total amount of traffic would be considerably increased by a reduction in the rate, and the other roads would be compelled to follow its action, whether they wished to do so or not.

There is, however, another form which this competition assumes which is frequently overlooked. It exhibits itself in the reductions which result from private contracts with large shippers. Thus in the recent packing-house products case, already referred to,[1] it appeared that certain large packers of Kansas City had contracted with President Stickney of the Great Western to give him a considerable portion of their traffic for a period of seven years provided he would lead out in making a certain reduction in the rate on packing-house products which they desired. To this proposition he agreed, and when the reduction was made, the other roads were compelled to meet it in order to retain any portion of the business whatever. There is no illegality in such a contract, for the reduced rate was open to all shippers. The Great Western was well repaid for taking the initiative in the reduction by a large increase in its proportion of the competitive business. Competition of this character will continue to exist as long as parallel lines are owned by different sets of stockholders.

Still it must be admitted that railway competition in our country is a much less potent factor than it was ten or twenty years ago. Nearly three fourths of the total mileage of the country is now owned or controlled by five different systems, and the community of interest between these systems is in many cases large. More than $2,000,000,000 of railway stock is now owned by

[1] See p. 30.

other railways, which amount constitutes about one third of the total.[1] Such relations as exist between the Union and the Southern Pacific, and between the Great Northern and the Northern Pacific, practically inhibit competition. That large sections of the country should thus be completely dominated by a single railway power, may justly be viewed with some alarm. Competition of markets is no more effective than competition of parallel lines after a community of interest has been established, if all the roads leading to the competing markets are under a common railway influence. It is necessary, therefore, that the public should provide itself with some adequate machinery for protecting itself from the abuse of such power. If such abuse should occur upon an extensive scale without the employment of proper means to prevent it, it is probable that much more radical and drastic action would eventually be taken by the public which in the end might be attended with most undesirable consequences.

Federal supervision of rates is also necessary to prevent unjust discrimination between carload and less than carload shipments. It has always been recognized that the railroads may charge less for carload lots in proportion to the lower cost of service. Any discrimination greater than this amounts to a direct discrimination against the smaller shipper.

It is true that for short distances, this difference in the cost of service may be very large, amounting, possibly, to twenty-five or fifty per cent of the rate. But for longer distances, under the system which the railroads now employ for handling such traffic, it becomes comparatively insignificant. For instance, upon shipments to the Pacific Coast, practically the only difference would be the cost of loading and unloading the cars, and the separate billing of the different items, which upon few kinds of traffic would

[1] Railway stock, exclusive of bonds.

average more than $5.00 per car. Yet the difference in rates frequently amounts to from $200 to $400 per car.

I am informed by a prominent furniture manufacturer of Chicago, that the rates on baby carriages to points in Montana and Wyoming, in less than carload lots, are, for commercial purposes, absolutely prohibitive, being two or three times as high as the rates which are made on carload lots. Furthermore, the railroads have steadily refused to allow baby carriages to be loaded in with carloads of furniture. The result is that the ordinary dealer who might easily handle several carloads of furniture in a single season, is practically prohibited from handling baby carriages, unless he can buy them in carload quantities. As a matter of fact, there are few if any cities throughout this whole section in which more than a single dealer could handle that many baby carriages in one season. The result is, therefore, that the whole of this business throughout that section is concentrated in very few hands, and the ordinary dealer is excluded from participating in it.

In justice to the railroads, however, it must be admitted that many of the discriminations, such as those just cited, are the result of carrying out the principle of charging what the traffic will bear. In this way the railroad is able to secure a high rate upon the many private shipments of single items, while allowing a comparatively low rate upon shipments which are purely commercial, and for the existence of which a low rate is absolutely essential. Therefore, it is not in the interests of the railroads themselves, to correct discriminations of this character, and it would seem that there should be some means by which equal treatment may be secured for the small shippers, wherever the revenue of the railroads will allow.[1]

[1] In the case of Frank G. Clark Company *vs.* The New York, New Haven and Hartford Railroad Company (11 I. C. C. Rep. 558), a situation appeared which would seem to indicate that the Federal Government should have some means of requiring railroads to promulgate

Finally, Federal control is necessary in order to do away with the evils which arise in connection with private car lines and the so-called terminal and industrial roads. The chief complaints against the private car lines are: (1) unreasonable icing charges, (2) refusal to supply the cars impartially to all shippers, and (3) excessive payments by the railroads for use of the cars.

Upon the whole, it must be admitted, however, that private car-line systems are beneficial. It would be a great economic waste for the railroads to purchase refrigerator cars in sufficient number for their requirements at all seasons of the year. Under the present system, these cars move from one part of the country to the other, in accordance with the demand for them, which changes with the season of the year. Thus in the early summer they may be used in the transportation of the Florida and Georgia peach and berry crops to Northern cities. A little later the same cars may be used in marketing the Michigan fruit crop, and in the fall of the year there is a heavy demand for these cars in moving California oranges and lemons eastward. The superiority of such a system over that of railroad ownership is at once apparent. Under the latter system, cars must be returned to the railroad owning them as soon as they reach their destination and are unloaded, and the time-limit for the return is so short that

reasonable through rates whenever the refusal to make such rates results in undue prejudice against particular shippers.

The defendant carrier in this case had united with other lines in promulgating through rates from Ohio River territory to New England points upon all traffic other than petroleum. Upon the latter commodity it exacted the whole of its local charge from the junction points of the connecting carrier. The result was that the through rate upon petroleum was unreasonably excessive, and the independent refiners who had to compete with the Standard Oil Company which owned pipe lines into the New England territory, were put to a great disadvantage. Nevertheless, it was held that under the existing law, the Commission had no power to grant relief.

This defect in the law is covered by the Hepburn Act, which gives the Commission the power to promulgate reasonable joint rates, and to apportion the same among the connecting carriers, whenever the latter shall fail to agree as to their respective shares.

frequently a return load cannot be secured. Consequently the supply of railroad owned refrigerator cars is not elastic enough to meet extraordinary and exceptional demands, and disastrous car famines have been of frequent occurrence. In the case of perishable traffic, such as fruits and meats, it is extremely important that the whole car supply of the country may be drawn upon in order to meet unusual demands. It is to meet this economic need that the present private car-line systems have been developed.

With regard to the icing charges, it seems that many of the complaints against the private car lines are well founded. In spite of the able defense which Mr. Armour has recently made for this system, it still remains true that these charges are, in many cases, two or three times the cost of service, and that they have advanced from 100 per cent to 300 per cent in the last eight or ten years. When the Père Marquette gave an exclusive contract for icing its cars to the Armour Company, the charges for icing were immediately advanced from 100 to 150 per cent over those which had prevailed when the railroad company itself performed this service.[1] Other similar instances might be given, but this subject has attracted such wide attention of late that many of them are a matter of common knowledge. That which especially serves to vitiate the system is that most of the refrigerator companies possessing these exclusive contracts are themselves large shippers of fresh meats and fruits. Accordingly an unreasonable charge for the necessary icing services acts in the same way as a direct rebate to them, since it is a matter of complete indifference to them what charges they pay to themselves upon their own shipments, while a high rate for this service tends to give them a peculiar advantage over their competitors.

[1] In the matter of charges for the transportation and refrigeration of fruit, etc., see 10 I. C. C. Rep. 360.

The remedy for this evil will be taken up in another connection.[1] It is sufficient to remark here that the private car lines, as far as possible, should be brought under the operation of the Interstate Commerce Act. Then, too, the railroad companies should themselves be made jointly responsible for these charges. If the icing charges cannot under the present law be termed a part of the rate for which the railways are responsible, we should have legislation making them so. Furthermore, wherever the icing services are performed by a private company, the charges for those services should be considered as a separate item from the remainder of the through rate. According to the decision of the Supreme Court in the case of the Chicago Terminal Charge,[2] it would seem that a special provision in the law, authorizing such separate consideration, would be necessary. In case such provision should be made, the only further requisite would be that the public should have more adequate control over rates.[3]

[1] See page 146 ff. In the case of Interstate Commerce Commission *vs.* Reichman (145 Fed. Rep. 235), decided in February, 1906, it was held that the private car lines were themselves interstate carriers, and were subject to regulation as to the reasonableness of their charges.

[2] 186 U. S. 320.

[3] This point is covered fairly well by the Hepburn Act as it was finally passed. The railroads are now required to publish separately icing charges and are clearly responsible for them. If a reduction is desired the process is exactly similar to that which will be followed in the case of extortionate or unjustly discriminatory rates. This provision in itself would not be sufficient, for the railroads could pay the icing companies large amounts for icing, while at the same time the charges to the public might be reasonable. This would act as an indirect rebate to the icing companies which are themselves large shippers. Fortunately this point is covered by another provision of the Act (section 4), which is to the effect that whenever any service is rendered in connection with transportation by the owner of the commodity transported, the charges for the same shall be no more than is just and reasonable, and the Commission is given power to reduce the same, as in the case of extortionate rates. It is possible, however, that this provision would not cover a case where the icing service was performed by a refrigerator company which had no other business. But if the owners of the stock of such a corporation were also owners of large quantities of the stock of companies engaged in the business of shipping fruit or other perishable commodities, the very evil which is sought to be avoided would be met with. It seems that nothing short of a provision to the effect that charges for all service

With regard to the charge that the railroads give the car owners preference in case of any car shortage, it may be said that such action is clearly illegal, both under the Interstate Commerce Act, and under the Elkins Amendment of 1903. That which is needed, therefore, is a more adequate and expeditious means of enforcing these laws, rather than a radical change in the law itself. As the Commission has frequently held, it is the duty of the railways, in such a case, to apportion their cars among the various shippers in proportion to the amount of business offered by each. The owners of the cars have no right to priority. Wherever a shipper has been discriminated against in this way, he should be allowed to recover to the full extent of the loss which he has incurred, owing to the refusal of the railroad to grant impartial service to all shippers.

The complaint that the railroads allow the car lines an unreasonable amount in payments for the use of the cars is not so well founded. The mileage rates seldom average over three fourths of a cent per mile each way. Still it must be admitted that even this moderate charge frequently admits of an exorbitant profit, often as high as forty per cent annually upon the investment. If the car owners themselves were not also large shippers, probably no one would complain. But as it is, the payment of an unreasonable mileage for the use of the cars acts as an indirect rebate to the car owners, and enables them to make prices which will crush competition. There is no doubt but that a clear case of unreasonable mileage would be covered by the Elkins Law, if that act were properly enforced. Not only does it provide severe penalties for all forms of direct rebates and discriminations, but also forbids all indirect discriminations, defining them as follows:

rendered in connection with transportation shall be reasonable and just both to the carrier and to the shipper, and upon complaint, subject to reduction by the Commission, would accomplish the results which are desired.

"Whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs, . . . *or whereby any other advantage is given or discrimination is practiced.*" If this provision were enforced, such abuses could be promptly remedied, and the car owners could be compelled to accept a reasonable payment for the use of their cars.

In connection with the so-called terminal and industrial roads, abuses even more flagrant arise. Instances of such abuse have received such wide notoriety of late that they need detain us here but a moment.

The International Harvester Company owns all of the stock of what is known as the Illinois and Northern Railroad. This road was chartered and organized as a separate company in 1901. It consists of some seventeen miles of track within the limits of the works of the International Harvester Company at Chicago, near 26th Street, about five miles of main track between 26th and 49th Streets, and trackage rights over the Santa Fe for about five miles more. In this way it makes connection with most of the roads centring in Chicago. Previous to January 1, 1904, cars had always been delivered from the works of the company to the various railroads, by independent belt lines, and by this new railway company at charges ranging from $1.00 to $3.50 per car. At that time, however, the Northern Illinois Railroad secured a division of the through rate by which it obtained twenty per cent of the rate to the Missouri River. The rate on farm machinery to the Missouri River is $60.00 per car, of which the Northern Illinois Railroad thus receives $12.00, in this way increasing its share by more than four hundred per cent. A reasonable charge for this switching service would not exceed $3.00 per car, and the balance of $9.00 per car practically amounts to a direct rebate to the International Harvester Company.[1]

[1] In the matter of divisions of joint rates and other allowances to terminal railroads, see 10 I. C. C. Rep. 385.

A similar case is that of the Chicago, Lake Shore and Eastern Railway, whose stock is owned by the Illinois Steel Company. It comprises some seventy-five miles of private trackage within the various works of the company, and less than ten miles outside these works. Since 1897, this company has received a division of the through rate amounting to twenty per cent of the rate to the Missouri River, fifteen per cent of the rate to Pittsburg, and ten per cent of the rate to the seaboard. Upon coke from the Connellsville region it receives a division amounting to seventy cents per ton, which yields the company a profit of nearly $1000 per trainload for the haul from Indiana Harbor to South Chicago, a distance of only seven miles.[1]

The Hutchinson and Arkansas River Railroad Company, owned by the Hutchinson Salt Trust, is a similar instance. This company owns less than a mile of siding, and no rolling-stock or equipment whatever, yet it receives 25 per cent of the rate to the Missouri River.[2]

The mere citation of these cases is sufficient to portray the enormity of some of the abuses which occur in connection with the system of terminal railroads owned by industrial corporations. The Commission has frequently declared that excessive payments to such terminal roads are unlawful under the Elkins Act, which forbids every device by which one shipper secures any undue advantage over others. If this provision should be found inadequate, a law should be passed whereby some public tribunal should have the power of apportioning the rate between two connecting railroads, wherever it appears that an unequal apportionment has been made in order to give some undue advantage to some particular shipper.[3]

[1] *Vide* Note 1, p. 51.

[2] Annual Report of the Interstate Commerce Commission, 1904, p. 44.

[3] It is doubtful whether the Hepburn Act, as finally passed, fully covered this point. The provisions which bear upon it are as follows:

Section 1. On and after May 1, 1908, common carriers are forbidden to transport any commodities other than timber which they may have

The evil of direct rebates and discrimination between individuals has been, perhaps, the most flagrant of all the abuses which arise in connection with our present transportation system. Such cases, however, are fully provided for in the Elkins Act, and in the Interstate Commerce Law. If a Commission were given the power to fix rates, the solution of this problem would be in no wise facilitated. Under the present system, rebates are unlawful, and punishable with severe penalties. For this reason they are necessarily secret, and are withheld upon any danger of exposure. Under the proposed system it would be just as easy secretly to cut under a Commission-

produced or in which they as owners may possess any interest, direct or indirect, except such commodities as may be intended for their use in the conduct of their business as common carriers.

This provision was intended to be a fatal blow to the so-called "industrial roads." But it may be doubted whether it could be construed so as to cover a case where the road in question was a distinct corporation, chartered under the laws of a state, and engaging in business within the state as a common carrier. But a considerable portion of the common stock of such a railroad might be owned by those in control of large manufacturing industries, and unequal apportionment of the joint tariff would act as an indirect rebate to the large shippers. Whatever may have been the intent of the law, the constitutionality of any provision which would forbid such a road from transporting the products of the manufacturing establishment might be seriously questioned. Such a law would virtually amount to saying that a man who is the owner of railway stock may not at the same time be an owner of industrial securities. The power to enact a provision of this character could certainly not be among the delegated powers of the Federal Government.

By section 2, common carriers are required to file with the Commission all contracts and agreements with other carriers relating to traffic affected by the Act.

If this provision is duly enforced it will at least prevent such cases from escaping the notice of the public. Furthermore this section reenacts the provisions of the Elkins Law, referred to in the text above, which it is believed effectively cover the case.

By section 4, the Commission is given the power to determine the respective shares of the various railroads with reference to a joint rate which has been set by it in pursuance of its delegated powers, concerning which the connecting carriers fail to agree. It does not, however, give the Commission the power to apportion the joint rate where the connecting carriers reach a voluntary agreement, even though such an agreement may result in injustice. This power of apportionment should be enlarged by special legislation to cover the cases of an unequal division of the joint rate, such as have arisen in connection with the "so-called" industrial roads, as we have recommended in the text above.

made rate as one made by the railroads themselves. But if the Commission were also given the power to set a minimum rate, the probability of secret concessions would be greatly increased.

The testimony of those who are in the best position to know is practically unanimous in support of the opinion that the Elkins Law of 1903 has been most effective in doing away with this class of evils.[1] Among the important changes made by this law were the following:

1. It makes the railway corporation itself liable to prosecution in all cases where only its officers and agents were liable under the former law.

2. Heavy fines are now substituted for imprisonment.[2] Previous to the passage of this law the punishment was too severe to be enforced.

3. In order to prove that an unlawful preferential rate had been allowed, it was formerly necessary to establish the fact that some other shipper had been charged a higher rate for absolutely similar and contemporaneous

[1] Annual Report of the Interstate Commerce Commission, 1903, p. 10. Passage quoted p. 12 above.

[2] An interesting controversy has arisen as to whether the penalty of imprisonment may not be imposed under the law. While it is admitted that it was the intention of the Act to abolish imprisonment as a punishment for giving rebates, it is contended that such a penalty could still be imposed by indicting the offending party for conspiracy to commit an offense against the United States. In rendering a decision upon an indictment of this kind the Circuit Court of the Southern District of New York expressed itself as follows:

"In my opinion, it is not in the power of the government, by calling the same acts a conspiracy, to indict these defendants for a different crime, and thereby subject them to the liability of imprisonment for acts for which such punishment was expressly abolished by the Elkins Act." (146 Fed. Rep. 298.)

In the case of Thomas and Taggart in the District Court for the Western District of Missouri, the court took a directly contrary view, and it was held that the punishment of imprisonment could be imposed upon an indictment under the conspiracy clause of Section 5440 of the Revised Statutes. (145 Fed. Rep. 74.)

This confusion in the interpretation of the law will be eliminated under the new rate law of June, 1906, by which the punishment of imprisonment is reimposed upon both the agents of the carrier and the shipper convicted of giving or receiving rebates.

shipments, a thing which, in most cases, it was very difficult to do. Under the present law, it is only necessary to prove that some shipper has been charged less than the published rate, which is comparatively a simple matter.

4. A more important change resulted from the provision which confers jurisdiction upon the circuit courts to restrain departures from the published rates, or any discrimination forbidden by law, by writ of injunction, or by other appropriate process. If there is reasonable ground to believe that tariffs have been disregarded, any circuit court may now enjoin the offending carrier from continued violations of the law, and it may punish continued disobedience by the summary process of contempt of court.

Evidently these provisions are a great improvement over the old law. Within two months after the Act went into effect, the circuit courts had issued injunctions against more than thirty railroads.

But one other point remains to be considered in this connection. In the President's Message to Congress of December, 1905, he advocated a rather extraordinary policy, which has since received considerable support in Congress and throughout the country. It is that as soon as it has been proved that any railroad has been guilty of giving any secret rebates, the maximum charge which the railroad might enforce for the future should be immediately set by the Commission at the lowest rate accorded the most favored shipper.[1] It is marvelous that such a policy could emanate from so high an authority, and receive such strong support. Rebates will never be entirely eliminated any more than robberies, no matter how severe may be the penalties which are placed upon the statute-books. Suppose some over-zealous traffic manager at Kansas City were to give a rebate of twenty-five per cent on a shipment of grain to Chicago. If this

[1] This provision was not embodied in the final draft of the Hepburn Act.

were to become known, the railroad, according to this plan, would be required to carry all shipments of grain to Chicago at a similar rate. Not only that, but all the competing roads would be compelled to meet this reduction, or to lose their proportion of the traffic. Then the roads leading to Galveston and New Orleans would see their traffic being taken away from them and diverted to the Eastern ports by reason of these lower rates to Chicago, and they would be compelled to make similar reductions in order to protect their interests. Furthermore, all the roads at Omaha, and at every other point competing with Kansas City, would also be compelled to make similar reductions or lose their share of the traffic. In short, rates over the whole country would be affected. It is quite possible that a permanent reduction of twenty-five per cent in the grain rates would practically bankrupt many of these Western roads. All this might come from the overzeal of a single traffic manager, in endeavoring to secure a shipment amounting, perhaps, to only a few carloads. Surely it would be better to mete out adequate punishment to the offending road than so severely to punish both innocent and guilty alike.

## CHAPTER III

### OBJECTIONS TO RATE-FIXING BY A COMMISSION

HAVING shown that Federal control of rates is necessary in order to avoid certain evils which have arisen in connection with our transportation system, let us now take up the general objections to a rigid system of public regulation, in order that we may be in a better position to devise a plan whereby many of the evils, alleged to be inherent in any system of public control, may be avoided.

The difficulties and dangers of government regulation have already been so thoroughly set forth by various writers, among whom the most prominent, perhaps, is Professor H. R. Meyer, in his recent work, "Government Regulation of Railway Rates," and by numerous railway advocates such as Mr. H. T. Newcomb, in almost countless polemical tracts and articles promulgated through the public press, that more than brief mention of the various points would lead to inexcusable repetition. Moreover some of these objections have already been considered in the preceding chapter, and most of them will reappear in connection with the discussion of the court decisions, while the legal objections will appear in the final chapter proposing an alternative policy to that of giving the Commission the power to fix rates at its discretion in all cases of complaint. Therefore, those points only will be considered which we do not believe to have received sufficient notice elsewhere.

The inference has been frequently drawn that once the Commission has been given power to fix rates, all intrinsic difficulties of the problem will adjust themselves. No such conclusion is warranted. As has been ably pointed out by

Professor H. R. Meyer, in the work referred to above, wherever government regulation has been tried, the difficulties have multipled rather than diminished.

First, then, among the objections which we shall consider is the utter lack of an adequate standard by which the reasonableness of a given rate may be adjudged. In all the agitation which has been going on for rate-fixing by a Commission, no one has yet volunteered any satisfactory information as to what principle ought to guide that Commission in the performance of its great task.

Suppose a specific rate were complained of before such a Commission. Obviously that body would be compelled to seek for some standard by which it might judge of the reasonableness both of the rate complained of and of the rate which it proposes to substitute for it.

The standard which has hitherto been applied in almost every case which has come before the Commission has been that of comparative rates either upon the same or upon other roads, with some allowance for a difference in conditions. Yet there are scarcely two important points in the whole country where the conditions are altogether similar. In the first place a great difference may exist in the relative costs of service. For instance, wherever the traffic is already very heavy, additional traffic can be carried only at great expense, but where the amount of traffic is light, and cars and engines stand idle for a considerable portion of the time, the cost of carrying additional traffic is comparatively trivial. Secondly, there may be a considerable difference in the respective forces of competition at the different points. Even though a certain amount of competition may be present at each of two points, it may be much keener in the one case than in the other.

Finally, there may be a vast difference in the relative possibilities of developing traffic at the two points. In such a case, it might be advantageous for the road to make

rates to one point so low that for the time being they might be unprofitable, in order to develop traffic for the future, while in the other case, it might be that no great amount of traffic could be secured whatever rates were charged by the railroad.

It would be only in rare and exceptional instances that these various factors would be of equal force at different points. If the Commission, therefore, is to use the standard of comparative rates for the purpose of determining the reasonableness of rates complained of, and if it is to proceed with any degree of fairness, it will be necessary for it to estimate the amount of the dissimilarity in conditions in terms of cents per 100 lbs. in the rate. Such a process is extremely difficult and incapable of being carried out with any degree of scientific accuracy.

In the first place, how is it possible to determine the relative costs of service where the conditions are in any degree dissimilar? In one case there may be a movement of empty cars in the same direction as that of the traffic in question. In such a case, if there were any possibility of developing a large amount of traffic, a very low rate would be made by the railroad, for the additional cost of carrying this traffic would only be the difference in the cost of hauling empty and loaded cars. In the other case, the movement of empty cars might be in a direction opposite to that of the traffic in question. Under such circumstances, any increase in the amount of traffic would cost the railroad, not only the full amount of the expense of hauling a loaded car, but also that of hauling the empty car back to the initial point of shipment, since, under the assumption, it would be impossible to secure a return load.

Even if it were possible to ascertain the difference in the respective assignable costs of service in such a case, it is altogether unlikely that any Commission would admit of such a wide dissimilarity of rates as would result from

basing them upon such a dissimilarity in the relative costs of service. And yet, would it be entirely fair to the railroads to refuse to make full allowance for such dissimilarity in conditions? Furthermore, a refusal on the part of the Commission to make full allowance for such differences in the relative costs of service would result in great economic loss, and in the end would be disastrous. To illustrate this point, let us assume a specific case.

Let A and B be two points served by the same railroad. Suppose the rates at these points were ten and fifty cents respectively, such rates being based upon the respective assignable costs of service of eight and forty cents, the discrepancy arising from some such a dissimilarity in traffic conditions as that cited above.

Suppose also that under the stimulation of the much lower rate at A a traffic of one thousand tons daily had been developed at that point, while at B, owing to the higher rate, only two hundred tons could be obtained. Let us assume also that the difference in the rate is the only cause of the discrepancy in the amount of traffic at the two points.

The total cost of service for the transportation of the 1200 tons of traffic would then be as follows:

$$(\$.08\times 20\times 1000) + (\$.40\times 20\times 200) = \$3200.$$

On the other hand, the total amount paid by the shippers for the transportation of these 1200 tons would be:

$$(\$.10\times 20\times 1000) + (\$.50\times 20\times 200) = \$4000.$$

Now suppose a Commission should declare this variance of rates an unjust discrimination against B, and that it should accordingly order the road to charge twenty-five cents to both points. The result of compliance with such an order would be that the traffic at A would fall off, and that at B would increase, till eventually there would be 600 tons of traffic at each point. Such an outcome would probably seem desirable to the merchants at B, but their

gain would be more than offset by the loss to the merchants at A, and by the net loss to the whole community. After the readjustment had taken place, the total cost of service to the railroad for the same volume of traffic would be

$$(\$.08\times 20\times 600) + (\$.40\times 20\times 600) = \$5760.$$

Thus the additional expenses of operation due to this particular traffic would be increased by $2560, or 78 per cent. Likewise the total amount charged for this service would be correspondingly increased. This would now be as follows:

$$(\$.25\times 20\times 600) + (\$.25\times 20\times 600) = \$6000.$$

This represents a net increase of $2000, or 50 per cent.

Similar results, though of a less striking character, would be obtained from any reduction whatever in the differential. Suppose the Commission wished to be very conservative, and only ordered that the differential should not exceed thirty cents. If the railroad were to comply by an advance of ten cents in the rate to A, which is altogether the most probable course it would pursue under such circumstances, and if the relative amount of traffic at the two points should change in like proportion, the total cost of service would then be as follows:

$$(\$.08\times 20\times 857) + (\$.40\times 20\times 343) = \$4115;$$

an increase of $985, or about 30 per cent.

The total charge upon the shippers would then be:

$$(\$.20\times 20\times 857) + (\$.50\times 20\times 343) = \$6858;$$

an increase of $2858, or about 72 per cent.

On the other hand, if the railroad were to comply with the order of the Commission by an advance of five cents in the rate to A, and by a corresponding reduction in the rate to B, and the relative amounts of traffic were correspondingly altered, the total cost of service would then be:

$$(\$.08\times 20\times 900) + (\$.40\times 20\times 300) = \$3840;$$

an increase of $640, or about 20 per cent.

On the other hand, the total charges paid by the shippers would now be:

$$(\$.15\times 20\times 900)+(\$.45\times 20\times 300)=\$5400;$$

an increase of $1400, or about 35 per cent.

Finally, suppose the Commission were to order a reduction of ten cents in the rate to B, while allowing no corresponding increase in the rate to A. The total cost of service would then be:

$$(\$.08\times 20\times 960)+(\$.40\times 20\times 240)=\$3456;$$

an increase of $256, or about 8 per cent. The total charges for the service would then be:

$$(\$.10\times 20\times 960)+(\$.40\times 20\times 240)=\$3840$$

a decrease of $160, or 4 per cent. On the other hand, the net revenue of the railroad would be reduced from $800 to $384, a net loss of 52 per cent. Certainly the trivial reduction in the average rates upon this traffic would not be sufficiently advantageous to offset this radical reduction in the net revenues of the railroad. Especially such a result would not be desirable if the road were not already paying more than a reasonable return upon its capital investment. The net loss of $416 in its revenue would, in such a case, necessarily be made up from increased charges upon other traffic, and other shippers would thus be compelled to pay $416 in return for a reduction of $160 in the rates paid by the shippers at B.[1]

The results obtained above illustrate the extreme danger of any governmental tinkering whatever with a differential which is the legitimate result of differences in traffic conditions.

In the illustration used in the preceding section, we

[1] It must not be supposed that we have assumed that conditions such as these are frequently met with in actual life. In practically every case there are other causes than the *quantum* of the rate which determine the relative amounts of traffic which are obtained by competing points, but to the extent that the distribution of the business is a matter of the rate, the propositions here advanced hold true.

have assumed that the advantages of A and B for developing traffic were substantially similar, and that the relative amount of traffic at each point was entirely dependent upon the rate. Now let us assume that the relative costs of service were the same, say eight cents per 100 lbs., but that the natural advantages of A for developing a large traffic were much greater than those of B. Let us suppose, therefore, that the amount of traffic obtainable at A and B respectively were as follows:

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| At A, with a rate of | 50 | cts. per | 100 lbs., | 100 | tons, | net | revenue : | $840 |
| " | " | 40 | " | 200 | " | " | " | 1280 |
| " | " | 30 | " | 400 | " | " | " | 1760 |
| " | " | 20 | " | 800 | " | " | " | 1920 |
| " | " | 10 | " | 1600 | " | " | " | 640 |
| At B, | " | 50 | " | 100 | " | " | " | 840 |
| " | " | 40 | " | 150 | " | " | " | 960 |
| " | " | 30 | " | 200 | " | " | " | 880 |
| " | " | 20 | " | 250 | " | " | " | 600 |
| " | " | 10 | " | 300 | " | " | " | 120 |

If the additional expenses of operation due to this particular traffic were eight cents per hundred in each case, the rates to the respective points would be as follows:

At A, the rate would be 24 cents, yielding a net revenue of $2048 upon 640 tons of traffic. At B, the rate would be 37 cents, yielding a maximum net revenue of $961 upon 155 tons of traffic. In both cases the rate would thus be placed at the point yielding the maximum net return.[1]

In order to arrive at one of those factors which are of controlling force in determining what rate shall be charged, we have so far taken into consideration what may be designated as the assignable cost of service, which consists of the additional expenses of operation which are due to the particular traffic in question, rather than the actual cost of service, which includes the proportion of the fixed charges and of the cost of maintenance which this traffic

[1] These rates are based upon the principle of charging what the traffic will bear. To find this rate, ascertain what net rate (=gross rate minus eight), multiplied by the amount of traffic which can be secured at that rate, will give the largest net revenue.

ought to bear. We must assume, therefore, in the above illustration, that the actual cost of service is much greater than eight cents, which we have put down as the assignable cost of service. Even the higher charge of 39 cents might be quite reasonable when compared with the actual cost of service.

The Interstate Commerce Commission has steadily refused to recognize such conditions as those cited in the illustration above as capable of producing substantially dissimilar circumstances which would justify such a discrimination in the rates as we have shown would result if the railroad were left free to make its own rates in accordance with business principles. We must assume, therefore, that if the present Commission were given the power to fix rates, it would order the railroad, in such a case as we have just cited, to do away with the differential, and to charge the same rate to both points. But neither rate could be raised or lowered without a direct loss to the railroad. If the railroad were to comply with such an order, it would probably make a rate of about thirty cents to both points, which would mean a loss of 240 tons to traffic at A, with a gain of only 45 tons at B. The net revenue derived from the traffic at both points would be greatly reduced, while the average rates per ton upon the whole traffic would be considerably increased. Not only would the railroad suffer in a loss of its revenue, but the community, as a whole, would suffer in a loss of a considerable portion of its business, and the trivial advantage of the merchants at B would be more than offset by the loss to those at A.

Finally, let us assume that the dissimilarity of conditions is the result of keener competition at A. Let us suppose also that the additional expense of handling the traffic and the natural advantages of each point for developing the traffic are the same. The statement might then be somewhat as follows:

| | | | | |
|---|---|---|---|---|
| Rate of | 10 cts. | per 100 lbs., | at A, | 1000 tons of traffic could be obtained. |
| " | 12 | " | 800 | " " |
| " | 14 | " | 600 | " " |
| " | 16 | " | 400 | " " |
| " | 18 | " | 200 | " " |
| " | 20 | " | 0 | " " |
| " | 10 | " | at B, 1000 | " " |
| " | 15 | " | 800 | " " |
| " | 20 | " | 600 | " " |
| " | 25 | " | 400 | " " |
| " | 30 | " | 250 | " " |
| " | 40 | " | 175 | " " |

If the railroad were free to make rates upon business principles, the rates which would be made under such circumstances would be 14 cents at A, with a maximum net revenue of $720 on 600 tons of traffic, while the rate at B would be 21.5 cents, with a maximum net revenue of $1458 upon 540 tons of traffic.

Now if the Commission were to declare that this discrimination of 7½ cents against B were unlawful, the road would comply with the order by advancing its rates to A to 21½ cents. It could much better afford to give up the entire traffic at that point, which at all events yields only a small profit, than it could afford to reduce its rates to B sufficiently to enable it still to share in the traffic at A. There would be, therefore, no change whatever in the rates to B, but the road would be excluded from a share in the traffic at A, and it would be compelled to make up its loss by higher charges to some other point.

The illustrations above clearly indicate certain points which I wish to make: first, the utter impracticability of any system of rate-making upon a mileage basis; secondly, the intricacy of the problem of rate-making; and finally, that any failure on the part of the Commission to take into consideration every one of those factors, which, if the railroad were left free to make rates upon business principles, would be of controlling force, and likewise any failure to make *full allowance* for each in its decision fixing the rate, would be very harmful to the interests of the country as a whole.

But even if the Commission were disposed to make full allowance for any dissimilarities such as those cited above, — and experience has shown that there are some circumstances under which the Commission is unwilling to make full allowance, — how would it be possible for it to do so? For instance, how would it be possible for it to measure the additional expenses of operation due to any particular item of traffic when the conditions which determine that additional cost of service change from day to day? On the other hand, if it wished to base the rate upon the actual cost of service, including a reasonable proportion of the fixed charges, how would it be possible to determine this? Moreover, how would it be possible for a Commission to estimate the relative intensity of the forces of competition where a certain amount of competition exists at each of several points? Would the Commission be inclined to assign the proper weight to market competition, and could it do so even if it desired? Finally, how could the Commission determine how much traffic would be developed by the rate which it proposes to enforce when that rate has not yet been tried?

Even if we could secure a Commission which would be disposed to make full allowance for all these varying conditions, it is inevitable that it should frequently make mistakes. Even the traffic managers, whose whole attention and energy are directed upon the problems involved in connection with but a very small portion of the total traffic of the country, often make mistakes. But under the present system, it is to the interest of the railroad to rectify such mistakes as soon as possible. The mistakes of a Government Commission, however, could be rectified only by a long and expensive judicial process. It appears, therefore, that a more legitimate function of the Commission would be to assist the railroad in discovering and rectifying its mistakes, leaving the punishment of the illegal acts of the railroads to the courts of law and equity where it properly belongs.

In the above illustrations we have assumed that both A and B were served by the same railroad. In such a case, if the Commission were given the power to fix rates, it could probably also name the differentials which should prevail between different points upon the same railroad. But suppose that A and B were served by different railroads. In such a case the only remedy for what might appear to be an unjust discrimination would be to reduce the rate to B, or to increase the rate to A, by separate action against one road or the other. But if the rate to B already bore a reasonable relation to the actual cost of service, and if the earnings of the road were moderate, the rate in question could not lawfully be reduced, whatever might be the rate to A. Moreover, the rate to A could not be increased without establishing a minimum rate. The undesirability of such a policy has already been discussed.[1] Thus even if the Commission is given the power to name a maximum rate, it will still be unable to remedy the vast majority of the inequalities in rates which prevail at present.

The difficulty of remedying such discrimination brings us to another important consideration. Upon what grounds may the rates to B be lawfully reduced? Obviously no reduction can be made that would deprive the railroad of the opportunity of earning a fair return upon its capital investment. If the Commission is to act intelligently, it will be necessary for it to take this factor into consideration whenever it proposes to reduce or to advance a rate. In this connection, three important problems at once present themselves. In the first place, what constitutes the capital investment upon which a fair return must be allowed? Secondly, what is a fair return? Is it three, four, or five per cent, or more than this, and if more, how much more? Thirdly, what is the relation of the particular rate in question to the average earnings of the road? Of the many thousands of different rates charged by the

[1] See page 25 ff.

railroad, all of which combined may tend to raise its earnings above a reasonable amount, is the particular rate in question one of those which may be declared unlawful?

Before we take up these points, however, let us for a moment consider a class of cases from which such questions may be eliminated. It is in this field also, that the usefulness of a Government Commission may be greatest. Such cases are those where it can be shown upon reasonable grounds that some reduction in the rate would lead to an increase of the traffic sufficient to maintain the earnings of the road unimpaired. It may be answered that the railroad, of its own accord, will correct rates of this character. Experience has shown, however, that they have not always done so. Such failures to do that which would seem to be in their own interests may be the result of inadvertence on the part of the railroad managers, but they are often the result of intentional discrimination against the weaker communities where the small shippers are located. The railroads are frequently almost completely dominated by certain large shippers at competitive points. Such a shipper is often in a position to compel a railroad, by means of a threat of the withdrawal of its share in the through traffic, to refuse to grant reasonable concessions in rates to his weaker rivals who are located at local points along the line of the railroad. A few such cases have already been discussed in the preceding chapter. It is by this form of discrimination, as well as by the secret rebate, that certain shippers have been able to crush competition and to establish themselves in almost a monopolistic position. If the rate to the point which is discriminated against could be reduced by some governmental authority, the railroad, as well as the community to which the lower rates were extended, would gain by the increased volume of the traffic. Moreover, the railroad would then have nothing to fear from the large shipper,

for the latter could no longer secure an advantage by a withdrawal of its share of the through traffic, for the rates to the intermediate points, being reduced in pursuance of the order of a governmental tribunal, could not be advanced, no matter what pressure were brought to bear on the railroad by the large shipper. He would, therefore, distribute his traffic the same as formerly in whatever proportion might be most advantageous to him. In such cases as these, therefore, the reduction of the rate would be warranted even though the road were not paying operating expenses.

Now let us assume that the reduction in the rate would be attended by a loss in the net revenue. The principle of allowing the road a fair return upon its capital investment would then have to be applied. But how are we to determine the *quantum* of the capital investment, and of what does it consist? Is it equal to the face value of all the outstanding securities of the railroad? If it were, a premium would be placed upon watered stock, and those roads which have invested their earnings in improvements, without a corresponding increase in the face value of their securities, would be placed at a great disadvantage when compared with those roads whose stock has been unduly inflated. Under such a system the roads, by sufficiently increasing their capitalization, would soon learn how to avoid all regulation. Obviously, such a proposition could not be the subject of serious consideration. The payment of a rate of four, five, or six per cent upon the face value of the securities can therefore have no signification whatever, so far as concerns the determination of a reasonable return upon the capital investment, unless we have some means of determining the relation which the total capitalization of the road bears to the actual capital investment.

Secondly, the proposition has been advanced that the true basis upon which our valuation should be made is

the market value of the stock, and that the roads should be allowed a fair return upon an amount equivalent to the present market value of all the outstanding securities. Obviously, such a policy could only lead us in a vicious circle. The market value of the stock represents exactly the estimated earning capacity of the road capitalized at the current rate of interest. But the earnings depend upon the rates which are charged, the volume of the traffic, and the relation of the expenses of operation to the gross revenue. If an unreasonably high rate were charged, and the amount of traffic were large and fairly constant, the earnings of the road would be heavy, and consequently the market value of the stock would be very high. If this method were employed for determining the capitalization, it would be impossible to reduce any rate that already yielded a maximum net return, for such action would tend to reduce the market price of the stock. It would result in reducing the rate of interest upon a sum equivalent to the aggregate market value of the stock to a point below the market rate, which, under our hypothesis, is the very thing that should not be done. Therefore, the adoption of this method of determining the capitalization upon which a reasonable return is to be allowed would mean the abandonment of practically all regulation. Under such a system, it would be impossible to prevent a general advance of rates. The large holders of railway stocks could arbitrarily advance the nominal price of these securities till the Commission would be compelled to justify any rate which the railroad wished to charge, in order that a reasonable return should be allowed upon this inflated capitalization. But it may be said that the Commission may take account of such manipulation of security values. Not only would there be great practical difficulties in determining whether a given price for the securities is legitimate or not, but if the Commission attempted to discriminate, it would, by the very act of such discrimination,

abandon the theory of capitalization upon the basis of market value, and it would be compelled to seek for some other standard.

Moreover, if the market value of the securities were taken as the basis of capitalization, the result would be that those struggling roads which have recently been built into new territory, and are now operated at a loss, and the value of whose stock at present is far below par, perhaps even below an amount which would represent the actual cash investment in construction, would always continue to be operated at a loss, till manipulators could be induced to arbitrarily inflate the value of the stock, a process by no means easy where the various holdings are small and scattered.

In the third place, it has been suggested that the railroads be allowed a fair return only upon the actual capital invested. The amount of such invested capital, however, could not be appraised even approximately. Should it include only the cash expenditure in the construction of the railroad, and the purchase of equipment, or should it cover the cost of securities to the original purchaser? If the former were to be taken as the basis, investors in railway securities would become so scarce that it would be utterly impossible to finance a new railroad. In the very nature of things, the capitalization must be large enough to cover the incidental losses which inevitably occur in connection with floating any new enterprise of this character. If, on the other hand, the capitalization were based upon the actual cost of the securities to the original investor, it would be necessary to allow rates to be charged in perpetuity which would enable the railroad to pay dividends upon enormous amounts of capital which have not infrequently been wasted in large payments to fake construction companies, by exorbitant promoters' profits, and by the blunders and incompetency of those in charge of the original enterprise.

Furthermore, such a system does not allow for alterations in the price of materials, and for progress in the industrial arts, by which many old investments of capital are rendered practically worthless. Such a method of appraisal would also work great injustice among the various railroads. One railroad might have paid practically no dividends for many years, preferring to invest its earnings in permanent improvements, while another might have paid a fair rate of dividends from the first, and have added little or nothing to its tangible assets by way of improvements paid for out of earnings. Obviously, it would be extremely unjust to limit these roads to the same rate of interest upon the original capital investment.

But aside from the injustice which would result from taking any one of these standards as a basis for capitalization, there would be insurmountable practical difficulties in connection with the use of any one of them. It would be utterly impossible to determine the initial cost of the actual construction of the railroad, and it would be equally impossible to ascertain the price paid for the original securities. Many of these securities were sold in job lots by private contract, in which cases the price was usually arrived at by private bargain, the promoter securing the best price he could, while the purchaser paid as little as possible. Furthermore, if the Commission wished to make allowance for the investment of earnings in permanent improvements, there is no system of railway accounting which has yet been adopted by the railroads which would indicate even approximately the amounts so expended, such items being frequently charged to the cost of maintenance. The Commission would be upon rather delicate grounds if it were to attempt to say exactly to what extent the failure to maintain a fair rate of dividends in times past was due to the investment of earnings, and to what extent it was due to bad management, poor business, or other causes.

Finally, the standard which is most frequently proposed as the proper basis for determining the capitalization upon which a reasonable return is to be allowed, is the present value of the tangible assets. Those who advocate this plan would allow nothing for what is known as goodwill, or the earning capacity of the railroad. To ascertain this value, we are told that we have but to appraise the present cost of reduplication, and to make due allowance for the depreciation of the existing property which has taken place through wear and tear. This method of appraisal, while necessarily difficult and inaccurate, nevertheless possesses a greater degree of practicability than any of the others proposed. It presents, however, a feature of injustice. The present holders of railway securities have purchased them at their market price. But the market price depends solely upon the earning capacity of the railroad and has nothing to do with the value of the tangible assets estimated on the basis of the cost of reduplication. If railroads were to be restricted to a fair return upon an amount equivalent to the cash value of their tangible assets, precipitous declines would at once take place in the value of many of our railway stocks, and innocent holders all over the country would suffer severe loss. Such arguments as these, however, only tend to befog the main issue. Whenever any one becomes the owner of railway stock, he assumes certain obligations to the public. Railroads cannot be permitted to maintain extortionate rates, merely because the maintenance of such rates is necessary in order to enable the railroad to continue to pay a fair rate of dividends upon the investment of some "poor widow." Railroads are legally bound to charge reasonable rates, whoever may be the owners of their stock, and whatever inflated prices they may have paid for it.

As has already been pointed out, however, this method of appraisal is an exceedingly difficult one. If it is to be employed at all as a basis for public regulation, it is neces-

sary that there should be some administrative machinery for making such appraisals. It is impossible for a Commission to arrive at any basis for intelligent action from hearing the testimony presented at the bar when the legality of some particular rate is questioned. It is altogether unlikely that the complainants could produce any reliable estimate of the cost of reduplication of the entire system or systems of railways over which their traffic moves. Even if the defendant railroads could produce such estimates, they would be apt to present the case in a light favorable to themselves, and the refutation of such evidence would be exceedingly difficult. Any estimate of the value of the tangible assets of the road, under such circumstances, could therefore be no more than mere guesswork.

If intelligent action is to be obtained, it is necessary that the government should face the problem squarely. It would be necessary that several commissions of experts should be employed continually, and that they should have no other business than to make these appraisals. It would probably not be possible for a single one of these commissions to make careful appraisals of more than three or four railroads each year. It would be necessary for it to traverse the whole length of the road, to measure carefully every grade and cut, and to estimate the value of the right of way, and that of the culverts and bridges, with all the rolling-stock and other railway property. That the results of such a process would be inaccurate is shown by the fact that the estimated cost of projected lines has frequently fallen fully twenty-five per cent short of the actual cost, even where that estimate has been made by experts, after an extremely minute and careful examination of the whole of the route surveyed.

After such appraisals had once been made by the government commissions, the problem would be somewhat simplified, though it would be necessary to keep constant surveillance over the condition in which the road-bed is

maintained, the amounts expended in its permanent improvement, the gradual deterioration in the value of the rolling-stock, together with additions to the same, the changes in the market price of all materials and labor, and the gradual enhancement or depreciation of the value of the real estate owned by the railroad, and that modifications should be made in the estimated capitalization from year to year, in accordance with the changes in these various factors. Doubtless the advocates of rate-fixing by a Commission will shrink from the establishment of so much administrative machinery, but they have so far proposed no other means by which a Commission may intelligently determine the reasonableness of a given rate *per se*.[1] How would it be possible to determine what constitutes legitimate earnings for a railroad unless we have some means of determining the amount of capital upon which a fair return is legitimate?

Now if we assume that we have a means for determining the actual value of the railway property, the next problem will be the determination of what constitutes a reasonable return upon that capital. Is it four, five, or six per cent, or more? If not a definite rate per cent, is it the loan market rate, the average return on capital invested in production outside of the railroad industry, or should it be more than this, and if more, how much more?

Of these three alternatives, the first two are manifestly impracticable. Either of them, if adopted, would practically mean the cessation of railroad building. Suppose we were able, by some mathematical process, to ascertain

[1] After the passage of the rate regulation bill in June, 1906, President Roosevelt and his friends conceived a plan for directing the Interstate Commerce Commission to supervise the work of making a fair appraisal of the value of all railway property in the United States. Bills to this end were introduced in both the Senate and the House, but just as this is going to press, word has come that the President has abandoned his efforts in this direction, both on account of the enormous expense involved, and of the little probability that the data finally obtained would be sufficiently accurate to possess any practical or scientific value.

that the average returns in other lines of industry, after due allowance had been made for exceptional gains and losses, were four per cent. The Commission would then limit the returns of the railroad to this amount. What intelligent business man would invest in a railroad upon such conditions? If he invests in other lines of industry, he is sure of a return of four per cent, providing his investments are sufficiently diversified. But if he invests in a railroad, on the other hand, he could obtain only four per cent as a maximum, with a possibility of a return much less than this, since practically no new railroads are perfectly sure of their ability to maintain a rate of dividends as high as four per cent, even though there may be no limitations as to the rates which they may be permitted to charge.

This fact is fully established by the history of our railroads, many of which paid no dividends at all for a long term of years, while in fully half of the cases there has been a total loss to the original stockholders. Therefore, it is only upon the possibility of a return much greater than the average that men may be induced to invest in a projected railroad. Railroad investment is at all events more or less precarious, and it is absolutely essential that there should be exceptional gains to counterbalance the exceptional losses. Otherwise no future development of the railway industry in this country can be expected. If, then, the return allowed must be greater than the average, how much greater shall it be?

Obviously, such a question cannot be answered *a priori*. There are many elements which would enter into the determination of the amount of the return which should be allowed in any given case. The Commission would be bound to consider whether the original investment had been well or ill advised. The public are certainly under no obligations to pay rates which would enable a railroad, which had been blunderingly built where there was little

economic need for it, to pay more than an average return upon its capital investment. Secondly, the Commission would necessarily inquire whether there were not other causes, apart from the rates charged, that would cause the earnings of the road to fall below the normal rate. Such causes might be the introduction of competition, or the changes in the trade-routes. There would be no justification in compelling the public to pay rates sufficient to cover the incidental losses in all cases. Such losses are absolutely inevitable in the ordinary course of trade and industry. That which is essential is that there should be sufficient exceptional gains to counterbalance in the long run these exceptional losses.

Furthermore, it would be necessary for the Commission to inquire into the past and present management of the railroad. A road which is well managed might be entitled to ten per cent, while two per cent might be excessive for a road that is poorly managed. Then, too, there are all degrees of bad and good management. In each case that came before it, the Commission would be placed on rather delicate grounds if it were to attempt to estimate the superiority of one management over that of another in terms of the rate per cent which should be allowed upon the capital investment. But if a sufficient premium is not placed upon extraordinary efficiency of management, it is certain that in no case will such efficiency of management be exhibited.

It cannot be denied that such problems as the above are extremely difficult. It is certain, however, that if intelligent action is to be obtained from a Commission which has been given the power to fix rates in all cases of complaint, not one of them can be ignored by that body, and that any failure to assign weight to any one of these various factors would be attended with disastrous consequences.

But there is still another consideration in connection with the return which should be allowed. Suppose a railroad,

owing to its efficient management, were found to be entitled to a return of six per cent upon its capital stock. There would still be a subterfuge by which it might increase its aggregate returns to a considerable extent. It could retire its bonds, and issue in their place a dividend of stock to the stockholders, and sell a sufficient amount of the stock in the open market to pay for the bonds retired. Thus without increasing its aggregate capitalization at all, the proportion of that capitalization which would be entitled to six per cent would be considerably increased. It would be necessary, therefore, that the Commission should take account of such transactions as these, which might be made by the railroad subsequently to the action of the Commission limiting the rate of dividends which a railroad might legitimately pay.[1]

Furthermore, there is no justification for the belief that the Commission would always be inclined to be liberal with the railroads. If the Commission were once given the power to fix rates, as we shall subsequently point out, the courts could not review the exercise of its discretionary power. Only in the clearest cases of confiscation would its order be invalid. It might so act as to curtail the dividends, so that the original stockholders would suffer heavy loss, and it might thus discourage all future investment in railroads, without coming into contact with the constitutional prohibition against the taking of private property for public purposes without due compensation or due process of law. The conduct of some of our State Commissions would give us grounds to fear that such a short-sighted policy might be adopted. In December, 1905, the Illinois and the Nebraska Commissions both ordered blanket reductions of all intrastate rates. In many cases the reductions amounted to from four to twelve per cent,

[1] We do not wish to imply that the Commission would actually limit the rate of dividends, but by the reduction of a rate because the rate of dividends exceeded a certain amount, it would virtually accomplish the same thing.

and they were made entirely apart from any careful consideration of the traffic conditions surrounding the particular commodities, the rates on which were reduced. The constitutionality of some of these reductions has been seriously questioned.

In Texas, the power to fix rates has been exercised by a commission for more than a decade. In 1894, the capitalization of the various roads in Texas averaged $40,873 per mile. By 1904, the average capitalization had been reduced to $32,400 per mile, a net reduction of more than twenty per cent. Yet in spite of this enormous reduction in the capitalization, the Commission has so greatly reduced the rates on the Texas railroads that they are not yet able to meet their fixed charges. The percentage of the operating expenses to that of the gross income is higher than in almost any other state in the Union, being in 1905 76.91, and for the year 1904, 79.31. In 1905 the gross income of all the Texas roads was $68,145,132, while the gross operating expenses were $52,411,747, leaving a net income of only $15,737,385. The fixed charges for the same year were $15,034,000. It is needless to say that in not a few cases, the roads were unable to meet their fixed charges, while little or almost nothing was left to the stockholders.[1]

A third main difficulty which appears is that of determining the relation of the particular rate in question to the earnings of the road, and to the other rates charged. Obviously, all the rates charged by a railroad would not necessarily be unreasonable simply because the earnings of the road were excessive. Neither could we assume that the most unreasonable rate would be the first to be complained of. The Commission would have to decide, therefore, whether this particular rate, among the thousands of rates charged by the railroad, is one of those which are unreasonable. But it would manifestly be impossible for

[1] *Report of the Texas Railroad Commission for* 1905, pp. 11, 420, 510.

the Commission to take into consideration the question of the reasonableness of every rate charged by the railroad, especially before such rates had been complained of. What could a Commission do in such a case other than to adopt the principle of first come, first served? The only alternative would be to compare the rate in question roughly with certain other rates charged by the railroad, and to make the best guess possible as to their relative reasonableness.

Another important objection to rate-fixing by a Commission is the danger of rigidity of rates.[1] One of the most important factors in the development of our national resources has been the acuteness with which our railway managers have foreseen the possibility of developing traffic, and the readiness with which, in such cases, they have frequently made rates which might have been far below the immediate cost of the service, with the expectation that the traffic would eventually become profitable by reason of its increased volume. If the Commission is given the power to fix all rates in case of complaint, several causes will operate to check this policy on the part of the railroads, which has hitherto been of such great advantage to the country as a whole.

In the first place, if the power to fix rates includes the power to set a minimum or absolute rate, it will act as an absolute check to such reductions wherever it is exercised. Secondly, even if the Commission were only given the power to fix maximum rates, this power might be so exercised as to bring about similar results. Wherever state regulation of rates has been tried, the railroads in fear and trembling begin to think out plans by which they may prevent a reduction of their rates and the resulting cur-

[1] Since the above was written a number of State Commissions have issued orders for the promulgation of hard and fast schedules of maximum mileage rates. The most striking of these perhaps is the schedule of class and commodity rates which the Minnesota Commission declared should be made effective in that State upon and after the first day of January, 1907. The constitutionality of this order has been strongly questioned, and the railroads will appeal to the courts.

tailment of their dividends. They cease voluntarily to reduce rates, even where they could greatly increase the traffic by so doing, for fear that the government will reduce other rates, in order to maintain the existing differentials between localities and classes of commodities, since they would lose more by the substantial reduction of the rates to those points where there was little probability of any considerable increase of traffic than they would gain by the increase of the traffic at other points.[1]

In the second place, railroads would refuse to make such voluntary reductions, for fear that if the traffic should not develop in accordance with their expectations, and the new rate should prove to be permanently unprofitable, they would find it difficult to restore the old rate. A governmental regulating body would be very apt to assume that the public has a vested right to long-established rates, and even to those which have been in force for a year or more, upon faith in the continuance of which capital has been invested and industries have been built up.

In 1891 and 1892 the British Parliament issued separate orders to each of the thirty-five principal railway systems in the United Kingdom establishing a system of maximum rates which might be enforced upon each of the various roads. In attempting to conform their schedules to these legal requirements, the railroads temporarily withdrew the special rates which had been accorded previous to that time. The resulting situation has been well described by Mr. Acworth:[2]

[1] In Georgia a railroad commission has long exercised the power to fix rates. The view of the situation which is taken by some of the people of that State is well illustrated by the following extract from the Atlanta *Journal:* "When a merchant approaches the railroad for rates in Georgia, he is met by the reply that the Railroad Commission regulates that, and he can get no reduction. If, however, they are asked for rates to towns outside of Georgia, the application receives immediate and favorable consideration." Furthermore, the same article goes on to show that the rates within the State of Georgia are much higher than those in neighboring states which possess no commissions with rate-fixing powers.

[2] W. M. Acworth, *The Elements of Railway Economics*, p. 151.

All over the country an outcry arose. Traders by hundreds and thousands refused to pay their monthly accounts. Parliament was appealed to, and representatives of the railways in the House of Commons were unable to make any satisfactory defense. The President of the Board of Trade hastened to promise in language not often heard by a Cabinet Minister, speaking officially in behalf of a great Department of State, that "the railways should be brought to their senses." And yet the railways had only attempted to charge the rates which Parliament, after ten years of investigation into the question, had just enacted as the rates which the companies "might lawfully charge and make." The irony of the situation was complete. Personal experience had done in a week what all the writings of "careful students of the question" could not accomplish in half a century, and had convinced the practical man, whether legislator or trader, that fixed maxima are next to no use in preventing extortion.

The result of this agitation was the passage of the Railway and Canal Traffic Act of 1894. This Act provides that any shipper may complain to the Railway Commission of any advance of rates on or after January 1, 1893, and that in any such case the burden of proof is upon the railroad to justify the advance. Since the passage of this Act, many complaints of this character have come before the Commission, and the decision has usually been against the railroads. In fact the Commission recognizes only two circumstances which would justify an advance, one being wherever such an advance is necessary to do away with unjust discriminations between localities and classes of commodities, and the other whenever the railroad can clearly show that the cost of handling the particular traffic in question has increased. Thus it happened that when for some external cause a road lost an important part of its traffic, consisting of half its export trade in coal, the Commission refused to allow the road to protect its earnings by higher charges upon other commodities.

The testimony of the best English authorities is to the effect that this legislation has done much to prevent any natural and gradual lowering of the rates.[1] A railway company is still free to reduce a rate, but it has ceased to be free to raise it. A manager will, therefore, refuse to make experimental reductions for the purpose of developing traffic. If such a rate should prove to be unprofitable, he would be unable to restore the old rate without facing a lawsuit, and even then he would be unsuccessful, unless he could demonstrate to the satisfaction of the Commission that the cost of handling the traffic in question had increased. According to the statistics given by Mr. Newcomb,[2] the average rates per ton upon English railways fell from 63.8 cents to 56.5 cents in the decade preceding 1892, but only from 56.5 cents to 55.2 cents during the succeeding decade, after the policy of rate-regulation had been inaugurated, a decline of 14.5 per cent for the first period as against a decline of only 2.3 per cent for the second.[3]

Another important objection to governmental fixing of railway rates is that it would have a tendency to destroy the incentive for improvement of service and for extraordinary efficiency of management, such as obtain under our present system. Why should railroad managers at great cost of effort endeavor to make further savings in the expenses of operation, if the additional revenue is to be taken away from them through an order of the Commission reducing the rates? We have already pointed out that it would be necessary for the Commission to take the efficiency of management into consideration in the determination of the rate of return which should be allowed upon the capital investment. It is extremely doubtful, however, whether it would be willing or able to give full

[1] W. M. Acworth, *Elements of Railway Economics*, p. 158.

[2] H. T. Newcomb, *Railway Rate-Regulation in Foreign Countries*, p. 11.

[3] There are no statistics published showing the average rates per ton-mile on the railways of Great Britain.

weight to the difference between ordinary and extraordinary efficiency of management. The roads whose affairs are managed with ordinary efficiency would probably be able to cover up their shortcomings, and to obtain the right to earn the same return as their more efficient rivals. At any rate, such a road would complain bitterly of the injustice of allowing any other road a higher rate of return than that to which it has itself been declared entitled. On the other hand, the road which had been managed with a little higher degree of efficiency would have difficulty in proving itself entitled to a higher rate of dividends. The differential gains resulting from such efficiency would thus be lost through a reduction of its rates on the part of the Commission. Wherever there is no incentive to special efficiency, such efficiency will not be found to exist. The result then of governmental rate-making would probably be that the efforts of railway managers would be diverted from making savings in management to influencing the Commission in order to prevent a reduction of rates.

Furthermore, there is danger that the Commission itself might not always be influenced by disinterested motives. No one would question the integrity of the members of the present Commission. But if that Commission or any other Commission were given general power over rates, the temptations would become very great. Aside from the danger of direct bribery by the railroads, with their millions of capital which might be used for that purpose, there are possibilities of at least two other more insidious evils. First, there are the dangers which would arise from stock speculation on the part of members of the Commission, and secondly and more important, is the absolute certainty that undue political pressure would be brought to bear upon the Commission by various communities and sections of the country which are always interested in obtaining rates that are especially favorable

to themselves, as against other competing communities or sections.

That species of gambling known as stock speculation has now become so common that there are but few who are not more or less concerned in it. Members of railway commissions are no less human than other individuals. Through their brokers it would be possible for them to engage in large transactions with practically no danger of detection. Moreover, every important case which would be decided by such a Commission would have more or less influence upon the price of the stock of the railroad affected. The members of this Commission, having a few days' advance knowledge of the way in which a case in question is about to be decided, could fairly estimate what would be the effect of its decision upon the market value of the stock of the interested railroad as soon as it should be made public. Is it not asking a great deal of human nature to expect that the commissioners will never so act upon the knowledge which they possess as to turn it to their advantage in secret transactions upon the stock market? Once the habit of speculation has been acquired by members of the Commission — and as long as they can trade with the practical certainty of profit we have every reason to believe that such habits will be acquired — it is difficult to believe that their decisions would not be somewhat affected by their personal interests.

The cry of the alarmist is never popular, nor is he often taken seriously till subsequent developments reveal conditions even worse than those against which the public has been forewarned. It may be said that the courts have long dealt with problems involving the interests of large corporations, and yet no general charge of corruption has been made against them. Still it is seldom the case that an important decision affecting corporate interests is not discounted in the stock market before it is made public. The same is true of nearly every government grain or cot-

ton crop report. Where do these "insiders" who act upon advance news of such decisions or reports get their information, if not directly from those who are responsible for such reports and decisions? It is not at all likely that such valuable information should have been imparted without compensation, and it may often be that much of the trading of this character is directly in behalf of the government officials themselves. At any rate it is reasonable to suppose that this is the case in view of the investigations of the past two years, which have proved that corruption has existed in those quarters where we should have least expected it. It is difficult to conceive of any situation which would offer more excellent opportunities for such transactions as we have described than placing the whole of the rate-making power of the country in the hands of a single Commission. The property interests involved in the cases that would come before this Commission in a single year would be greater than that of all the cases which would come before the Federal Courts in a decade.

But there is even a greater problem to be met in any attempt to fix rates by a Commission. This will appear whenever the Commission attempts to settle a differential. The East demands a rate which will enable it to compete with the South in the export trade in grain. Each section is convinced that the other has an undue advantage over it. How would it be possible for a Government Commission to settle such a dispute without involving the government in all the unpopularity with which such rates are invariably received upon both sides? It would be almost inevitable that such rates should become a political issue. Railroad rates are able to make and unmake great cities. Witness the conflict which Philadelphia waged with New York for a share in the export trade. Such diverging interests appear in almost every rate. Any low rate extended to one section means a comparative disadvantage to some other section of the country which competes with it. The

low rates on agricultural products from the West result in the destruction of the value of Eastern agricultural property. Whenever a political body is given the power to make rates, all the influence of established industries is brought to bear to prevent the extension of such rates as will build up competing industries elsewhere, or if that tribunal has not the power to name a minimum or absolute rate, they try to obtain rates for themselves which are enough lower than those extended to their competitors so that they are able to maintain the existing differentials and relative advantages.

Under the present system, such questions are settled by the forces of competition and compromise between railroads. This may at times lead to changes in the existing trade-routes, perhaps to the great disadvantage of certain vested interests, but it results in giving to the American farmer the benefit of the lowest possible rates to the world's markets.

This point has already been so thoroughly treated by various writers that, while we consider it perhaps the most important objection to government-made rates, we will pass it by with a bare notice. Professor H. R. Meyer has produced evidence which proves beyond all reasonable doubt that the system of government rate-making has had a most pernicious effect upon the development of the industries of Europe and Australia.

In Germany, sectional conflicts have prevented the extension of low rates to points where industries could be developed, and the traffic greatly increased. Points possessing the advantages of water communications have a tremendous advantage over other points which can be reached only by rail. The government has steadily refused to make rates that would enable the railways to compete with the river and canal routes. Important treaties and laws have been opposed by delegates of some of the Western States, in order to force the government to

withdraw certain low rates which had been extended in order to enable the grain of the more distant sections to move westward by rail, and thus to supply the Western manufacturing centres with this much-needed commodity. The Western agricultural interests were determined to leave no stone unturned to prevent this outcome, and unfortunately they were only too successful.

In France, no railroad may raise or lower a rate without the consent of the Commissioner of Railways. The various railways are compelled to maintain rates at least twenty per cent higher than those of the water routes. The guarantee of a high rate of dividends upon the stock of the railroads has proved most expensive to the government and conducive to lax management on the part of the railroads.

In Russia, the landowning aristocracy of the west has brought such political influence to bear, that even an autocratic government could not resist it, and the Minister of Railways was compelled to withdraw rates on grain which had enabled the cereal products of Siberia to find an outlet upon the Black and the Baltic Seas. At present the rate per ton-mile on Siberian grain which moves 1000 miles and upward is higher by at least 75 per cent than the rate per ton-mile for much shorter distances in Western Russia. The only port which the products of Siberia can now reach is Archangel, which is frozen up for the greater part of the year.

In Australia, the tremendous influence of the great seaboard cities has been brought to bear upon the government to prevent the building up of interior distributing centres. This object is accomplished by means of enforcing a uniform system of tapering rates. The only important inland cities in Australia are those which have been built up at the terminals of the railways, where a break in transportation occurs. But as soon as the railroad is extended beyond that point such cities invariably lose their

business to the larger distributing centres on the coast. Thus the city of Ballarat had attained considerable importance by virtue of its situation at the head of one of the railways, but as soon as the railway was built further into the interior, that city was unable to obtain rates which would enable it to compete on even terms with the seaboard cities, the result being that its business was practically destroyed. If the Australian railways had been under private control, the merchants of Ballarat would have gone to them and asked for rates which would have enabled them to remain in business, and there is every probability that their petition would have been favorably received by the railroads. But since the responsibility for the rates lay with the government, it was found impossible to obtain reasonable concessions against the strenuous political opposition of the great seaboard cities.[1]

If, then, we consider carefully the many objections to a system under which final responsibility for rates rests with the government rather than with the railroads themselves, and the limited scope in which government regulation is advantageous, we must conclude that the least governmental interference which will secure desired advantages is preferable to any system granting broad far-reaching powers, the exercise of which will inevitably be attended with such evils as have been described.

[1] For a full discussion of this subject, see H. R. Meyer, *Government Regulation of Railway Rates*, chapters i to viii. Also a series of articles by the same author in the *Railway Age* for 1903.

## CHAPTER IV

### THE INTERSTATE COMMERCE ACT AND ITS INTERPRETATION BY THE COMMISSION AND BY THE COURTS

The Federal Government was slow to exercise its undoubted right to regulate interstate commerce. The early theory was that Congress and the states exercised concurrent jurisdiction over this subject, and that the states might therefore make whatever regulations they saw fit, provided that they did not discriminate against goods from other states. In the case of Livingston *vs.* Ingen, decided in 1812, it was held that in the absence of any Act of Congress to the contrary the State of New York lawfully granted a monopoly of steamboat transportation upon the Hudson River for a period of twenty years.

In the subsequent case of Gibons *vs.* Ogden,[1] the Supreme Court of the United States held that the Act of the Legislature of New York was invalid, so far as it prohibited the navigation of steam vessels possessing a license to engage in the coasting trade, under a general Act of Congress. The court strongly asserted that the authority of Congress over interstate and foreign commerce was supreme. This right to regulate interstate commerce was held to include the right to regulate navigation, and the transportation of goods from one state to another, as well as the buying and selling of commodities.

In spite of the broad grounds upon which this decision was based, and of its strong assertion that the power of Congress over interstate commerce was supreme, even to the exclusion of concurrent jurisdiction by the states, the theory still prevailed that wherever Congress had not

[1] 9 Wheaton, 1.

acted, the states might make whatever regulations they saw fit. The result was that when railroads began to be built, and a large amount of through traffic was developed, it was believed that state regulation would be sufficient for any control which was then deemed necessary.

In Reading Railway *vs.* Pennsylvania,[1] this theory, so far as it applied to the exercise of the power of taxation over interstate commerce on the part of the states, was exploded. The law of Pennsylvania which imposed a tax upon every ton of traffic carried within the state was declared to be null and void, in that it was an interference with interstate commerce which Congress had declared should be free. Nevertheless, the theory that the states had the right to impose maximum rates which might be charged on interstate traffic still remained unquestioned.

In Baltimore and Ohio Railroad Company *vs.* Maryland,[2] it was held that the power of the state to regulate the rates of railway corporations doing business within its limits was "unlimited and uncontrolled," as far as the regulations applied to traffic originating within the state, or coming into it from another state. The Supreme Court, therefore, upheld an Act of the Legislature of Maryland, which set a maximum passenger fare of $2.50 from Baltimore to Washington, and which also imposed a tax of 20 per cent upon every fare collected between those points. The only reservation which the court made as to the power of the states to regulate interstate commerce was as follows:

> Should any such system of exactions be established in these states as to materially impede the passage of produce from one part of the country to another, it is hardly to be supposed that it is a *casus omissus* of the Constitution.

Thus in the opinion of the Supreme Court at that time, Congress possessed only a shadowy authority to regulate interstate rates, while the power of the states to make such regulations was "undoubted and unlimited."

[1] 15 Wallace, 232 (1872). [2] 21 Wallace, 456 (1874).

In 1876, in the case of Peik *vs.* The Chicago and Northwestern,[1] the Supreme Court reaffirmed the same doctrine. It was held in this case that the action of the Legislature of Illinois in regulating the rates and fares from points within the state to points outside, and from points in other states to points within the state, was a valid exercise of the constitutional powers of a state.

It was not till the year 1885, in the case of the Wabash Railroad *vs.* Illinois,[2] that this doctrine was clearly overruled, once and for all. It was then held that the power of Congress was exclusive, that in the very nature of the railroad industry, concurrent jurisdiction was an anomaly, and that the law of Illinois establishing maximum rates from Chicago to points outside the state was null and void.

But even while it was believed that the states possessed concurrent jurisdiction over the subject of interstate commerce, state laws proved wholly inadequate to meet the abuses which arose in connection with a great and growing national transportation system. In fact, whatever action was taken by the various states was practically confined to the regulation of commerce wholly intrastate. On the other hand, since the Federal Government knows no common law, and, as Congress had so far passed no Act for the regulation of interstate railway transportation, the result was that interstate traffic was not regulated at all, and the carriers made whatever rates they saw fit.

The testimony taken by the Hepburn Committee of Investigation, appointed by the Legislature of the State of New York, clearly showed that previous to the passage of the Interstate Commerce Act railway rates were in a thorough state of demoralization. Many traders testified that they never knew from one day to the next what rate they would be compelled to pay. Here is the evidence of one merchant:

[1] 94 U. S. 164. [2] 118 U. S. 557.

Q. In every instance when you ship from the west, do you make a special contract?

A. Always.

Q. You never confine yourself to schedule rates?

A. We know nothing about them; I never saw a schedule rate; I know nothing about that.

Q. How long have you been in business?

A. Twenty years, more or less.

Q. And during those twenty years, you have never known anything of schedule rates?

A. I have been in this country since 1866, and have never known anything of schedule rates and never saw a schedule rate.

The evidence before this Committee also showed that by far the larger proportion of the business of the State of New York was done at discriminatory rates. Five firms at Binghampton received special rates averaging less than half the rates paid by the rest of the public. At Utica three drapery firms obtained a rate of nine cents, while the rate on similar articles for all others was thirty-three cents. Five grocery firms at Syracuse received a special rate of ten cents, while the published charges ranged from eighteen to thirty-seven cents. In many cases it was proved that special rates had been accorded amounting to less than one fifth of the regular published charges. Mr. Goodman, Assistant General Freight Agent of the New York Central, testified that to his certain knowledge fifty per cent of the business from New York to other points and ninety per cent of the business at Syracuse was done at special rates. He stated further that there were no important points where some shippers were not accorded special rates far below the published charges.

Under conditions such as these it is not to be wondered at that there soon arose a strong demand for public control of interstate rates through the agency of the Federal Government. In 1873 a select committee of the House was appointed to investigate the alleged abuses in connection

with interstate transportation. This Committee, under the chairmanship of Mr. Windom, reported that there were three leading abuses which demanded a remedy through Federal legislation. These were, (1) the neglect of railways to furnish proper facilities and safety appliances, (2) unjust discriminations between localities and individuals, and (3) extortionate rates. The principal causes of the excessive charges of the railroads were alleged to be stock watering, the capitalization of surplus earnings, bogus construction rings, extravagance and corruption in management, and combinations between railroads. The Committee were of the opinion that competition would not correct the existing evils, and recommended: first, direct regulation of interstate commerce by Congress, secondly, a system of government roads to compete with the private lines, and finally, the improvement of the waterways. This report was adopted and discussed by the House, and an Act embodying some of its proposals was brought forward, but it failed to become a law.

In 1878 another attempt was made to pass a law for the purpose of regulating interstate commerce. The Reagan Bill, which was proposed at that time, contained many of the features of the present Interstate Commerce Law, except that, instead of creating a special commission for the enforcement of the proposed law, it lodged this power with the courts. It was not till the year 1887, however, that a bill of this character finally passed both Houses and became a law. We shall not attempt to enter into a history of the passage of this law, nor shall we discuss the interesting report of the Senate Committee of 1886 out of which it sprang, but as the provisions of the Act itself and their subsequent interpretation are of vital interest to our subject, they will be briefly enumerated.

Section 1. This section renders the Act applicable to all common carriers engaged in the transportation of property or persons for hire, either wholly or partly by

rail,[1] from one state to another, or from one state to a foreign country. It provides that all charges for such services shall be reasonable and just.[2]

Section 2. The charges for similar and contemporaneous services must be the same to all persons.

Section 3. It is made unlawful for any common carrier to give undue preference or advantage to any person, locality, or description of traffic.

Section 4. Carriers are forbidden to charge more for the shorter than for the longer distance, over the same line, in the same direction, where the conditions are substantially similar. The Commission is authorized to make exceptions to the application of this clause, after due investigation.

Section 5. All agreements for pooling traffic or earnings and combinations for the maintenance of rates are declared unlawful.

Section 6. Rate schedules must be printed and open for public inspection. Ten days' notice is required before any advance, and three days' notice before any reduction of a rate. It is made unlawful to collect more than the published charges for a given service. Carriers must file their rate schedules, and notices of all changes in the tariffs, with the Commission, together with all contracts

[1] The Hepburn Act as it finally became a law includes pipe-lines, private car lines, refrigerator companies engaged in icing cars, express companies, and sleeping-car companies.

[2] Other important amendments to this section as expressed in the final draft of the Hepburn Act are as follows:

Giving or accepting passes is strictly prohibited under penalty of fines ranging from $100 to $2000. Exception is made for passes given railway employees, and their families, or for charitable or public purposes. On and after May 1, 1908, railroads are forbidden to transport any property other than timber which may have been produced by them, or in which they may possess any interest, direct or indirect, except such property as may be intended for their use as common carriers.

Common carriers are required to make connection with lateral branch lines, and private switches, and to give impartial service to the applicant, whenever the construction of the proposed connection is practicable and the amount of traffic which can be secured at the given point is sufficient to justify the construction of such facilities.

and agreements with other carriers relating to the traffic affected by the Act. The Commission is given the power to prescribe the measure of publicity which must be given to joint tariffs.[1]

Section 7. Combinations to prevent the continuous carriage of freight to its final destination are prohibited.

Section 8. Any person injured by any unlawful act of the carrier may recover damages, costs, and attorney's fee.

Section 9. The injured person may complain before the Interstate Commerce Commission, or before the United States Circuit Court, and the officers of a railroad may be compelled to testify and produce books, but such evidence cannot be used against the person giving it in any subsequent criminal proceedings.

Section 10. The penalty for the violation of any of the foregoing provisions falls upon the officers and agents of the railroad. The fine for each offense is not to exceed $5000, or two years' imprisonment, or both. The term of imprisonment is to be added only in case the offense is

[1] This section was so amended in the Hepburn Act as to require the publication and filing of all joint rates, whenever made. All icing and terminal charges, together with such other charges as the Commission may direct, must be published separately.

Thirty days' notice is required for any change in the published rates, except that the Commission is given the authority to modify this provision upon good cause, either in particular instances, or by a general order applicable to special or peculiar circumstances.

The common carrier must file a copy of all contracts and agreements entered into with other carriers relating to any traffic affected by the Act. A carrier is prohibited from charging a greater or less or different compensation from that which is named in the published tariffs.

Section 1 of the Elkins Act of 1903 was so amended as to make corporations criminally liable for the illegal acts of their agents. A fine of from $1000 to $2000 is imposed for every case of unjust discrimination between shippers. Similar fines are imposed for soliciting or accepting rebates, or other concessions from the published tariffs. The agent or officer of the corporation giving or receiving such rebates or unlawful preferences may be imprisoned for a term not to exceed two years, while the shipper receiving the same, in addition to the other penalties named, may be required to pay a fine equal to three times the total amount so received, during the six years immediately preceding conviction.

a discrimination forbidden by law. Any person receiving a rebate or discriminatory rate, with the connivance of the carriers, or without such connivance through false representations, may also be subjected to a fine of $5000 and two years' imprisonment.

Section 11. A commission to be composed of five members is to be appointed by the President, with the advice and consent of the Senate. Not more than three commissioners are to be appointed from the same political party. The term of office is six years, but the President may at any time remove any commissioner for inefficiency, neglect, or malfeasance of office.[1]

Section 12. The Commission is granted the power of subpoena.[2] Self-incriminatory testimony must be given, but such testimony may not be used in the prosecution of the one giving it.

Section 13. In case of complaint with respect to any alleged excessive or unjust rate, the Commission should first use its good offices to effect a settlement without a formal hearing.

Section 14. The reports of the formal proceedings of the Commission should include the findings of fact and the recommendations made by the Commission. Its findings of fact are to be *prima facie* evidence in all subsequent judicial proceedings. The reports are to be printed.

Section 15. The carrier must comply with the order of the Commission within a specified term.

Section 16. When the carrier refuses to obey, the Commission or any other interested party may apply to the circuit court for an injunction compelling obedience.

[1] The new rate law which went into effect August 28, 1906, provides that the number of Commissioners shall be increased to seven, the term of office made seven years, while the salary is raised to $10,000 per annum.

[2] The Commission has no power to enforce the giving of testimony, which it may lawfully require, except through an order of a duly constituted court. This fact has often been the source of tedious delays and much annoyance.

An appeal is allowed to the Supreme Court, if the amount in question exceeds $2000. The appeal does not stop the lower court from collecting costs and fines, though the fines would have to be held in escrow till the final decision. The court may assess a fine of $500 per day for a refusal on the part of the railroad to obey the order of the Commission.

Section 17. The Commission is to proceed at discretion. No Commissioner may sit upon a case in which he is personally interested.

Sections 18 to 21. The salary of the Commissioners is to be $7500 per year. The expenses of the proceedings are defrayed by the United States. The principal office is to be in Washington, but the Commission may sit elsewhere. The Commission may require annual and uniform accounts from the railroads, and it is to make an annual report.

Section 22. The Act does not apply to the handling of property free or at reduced rates for the United States Government, or for state or municipal governments. It does not apply to the handling of property at reduced rates for charitable purposes, or to property which is being shipped to or from fairs and expositions. It does not apply to the carriage of railway employees free or at reduced rates, or to special concessions to ministers of religion, or to inmates of state or national houses, or to the granting of mileage, excursion, or commutation tickets.[1]

[1] The following important changes were made in the Hepburn Act as it was finally passed, June 29, 1906:

It is made the duty of the Commission after investigation, upon complaint, whenever it is of the opinion that certain charges or practices of a carrier are extortionate, unreasonable, or unduly discriminatory, to prescribe what shall be the maximum rate or rule of action for the future. The order is to go into effect after the expiration of thirty days from the date of issue. If the carrier refuses to obey, the Commission may enforce its order in any duly constituted court having jurisdiction. The court is bound to enforce the order of the Commission by summary process, mandatory or otherwise, whenever such order has been found to have been "regularly made and duly served." A fine of $5000 per day may

Now with the Act before us, let us follow its subsequent interpretation by the Commission and by the courts. In order to guard against the possibility of giving a partial or unfair discussion of the subject, we shall take up all the cases where the Commission has applied to the court for the enforcement of an order regarding changes in the published rates. It is impossible to differentiate the cases clearly with regard to their subject-matter, for many of them involve several points. We have grouped them, therefore, with regard to what seemed to be the most important point at issue in the particular case. By far the largest group is that in which was involved the interpretation of the long and short haul clause of the fourth section of the Act.

## THE SAN BERNARDINO CASE

*The San Bernardino Board of Trade* vs. *A. T. & S. F. et al.*[1]

The rates from Eastern points to San Bernardino, California, were considerably higher than those in force to Los Angeles, which was situated at the greater distance. The Commission held as follows:

be imposed for continued violation of the order of the Commission. The order remains in force for such time as the Commission shall designate, not exceeding two years.

In specific cases the Commission may award damages to the complainant. These awards may be recovered by ordinary legal process. The findings of the Commission in such cases are considered *prima facie* evidence. The costs of such cases are borne by the United States, unless the petitioner carries his case to a higher court upon appeal, in which case he is required to pay the costs of the appeal. In case the complainant finally prevails, the entire costs of the case, together with a reasonable attorney's fee, must be paid by the defendant railroad.

The carrier may appeal to the circuit court having jurisdiction for temporary or permanent injunction to prevent the enforcement of the order of the Commission. No temporary injunction may be issued, however, except upon hearing after five days' notice to the Commission. An appeal from such decree or injunction lies only to the Supreme Court, where the Expediting Act of 1903 applies, and the case takes precedence over all others, except criminal cases and those of a like character.

Other important provisions of the Hepburn Act have been referred to elsewhere. See notes, pp. 39, 49, 52, 95, 96, 97.

[1] 4 I. C. C. Rep. 104, 1890; 50 Fed. Rep. 265, 1892.

> The complaint in itself is sufficient to put the carriers on proof that the services were rendered under such circumstances as to justify the greater charge. . . . The water competition which will justify a greater charge for a shorter distance must be actual, and not potential.

Since it did not appear that there was actual water competition with respect to the commodities the rates upon which were complained of, the Commission ordered that the rates to San Bernardino should be reduced to the extent that they should not exceed the rates to Los Angeles.

The Circuit Court, however, found the facts widely different from those set forth in the report of the Commission. New evidence was offered by the railroad before the court, tending to show that there was actual competition between the rail and water carriers with respect to those commodities mentioned in the petition. Accordingly the order of the Commission was not sustained.

A few years later the same point came before the Commission in another connection.[1] In that case the Commission, while justifying the lower charge to Los Angeles by reason of the water competition existing at that point, uttered a dictum which has been the source of some of the bitterest attacks against it, but a dictum which in a broad way is not supported by the actual decisions of the Commission. Speaking of the competition of the northern routes with the Southern Pacific and the Santa Fe for the trade of Los Angeles, the Commission remarked as follows:

> Merchandise by these rail and water routes to Los Angeles must be transported by rail across the continent, transshipped and carried twelve hundred miles by ocean, and again transshipped for another twenty miles' haul by rail, before it reaches Los Angeles in competition with the Southern Pacific and the Santa Fe railways. While traffic may be, and at times actually is, carried by such circuitous rail and water routes, it is questionable whether it ought to be, and the Commission does

[1] Holdskom *vs.* M. C. Ry. Co. *et al.*, 9 I. C. C. Rep. 42.

not hold in this case that such competition in itself justifies a higher rate at an intermediate point such as San Bernardino than is enforced from the East to Los Angeles.

From this dictum it is argued that the Commission, if it had the power, would seek to determine by which of several competing routes traffic might lawfully move. It must be borne in mind, however, that this dictum is merely a reservation on the part of the Commission in order to avoid a dangerous precedent. The case was decided against the complainant upon other grounds.[1]

### THE FARGO SUGAR CASE

*E. M. Raworth* vs. *Northern Pacific Railway et al.*[2]

The rate on sugar from San Francisco to St. Paul was sixty-five cents per 100 lbs., while the rate to Fargo,

[1] A case where the order of the Commission, if it had been enforced, would have indirectly resulted in the exclusion of the more circuitous route from a share in the traffic, is that of the Boston and Albany R. R. Co. *vs.* The Boston and Lowell R. R. Co. *et al.* 1 I. C. C. Rep. 158. See also H. R. Meyer, *Government Regulation of Railway Rates*, pp. 351 ff. The decision in this case has been strongly criticised by various authors, especially by Mr. H. R. Meyer. The evidence showed that the road possessing the more circuitous route could not compete for the through traffic without charging less than it could well afford to certain intermediate points, providing it were compelled to abide by the long and short haul provision. The Commission fully recognized the difficulties of the situation, and expressly affirmed the right of the road possessing the more circuitous route to make rates which would enable it to compete for a share of the through business. Nevertheless, the law prohibiting a greater charge for the shorter distance appeared to admit of no exception under such circumstances as these. It would be impossible to grant the privilege of departure from the observance of the provision to one of a number of competing roads, while not at the same time granting the same privilege to all. The Commission doubted the wisdom of the law, but it believed it to be its duty to enforce its provisions regardless of its own opinion as to the wisdom of the policy. Accordingly the carrier was ordered to cease charging more for the shorter distance. It should be remembered, however, that this was one of the earliest decisions of the Commission, and the principle upon which it rested was expressly overruled in later cases. (See rulings No. 913 and 914, Annual Reports of the Interstate Commerce Commission.) In these cases the Commission expressly allowed the roads to charge less for the shorter haul, where it was shown that they were subject to the competition of more direct routes.

[2] 5 I. C. C. Rep. 234. April, 1892.

South Dakota, two hundred and forty miles nearer San Francisco, was ninety-seven cents. It appeared that for a long time there had been a flat rate of 65 cents both to St. Paul and to Fargo. Under these conditions, the complainant had built up a profitable sugar business at Fargo, competing with the merchants of St. Paul upon equal terms for the trade of the intervening territory. When the Fargo rate was advanced to 97 cents, there was no change in the rate to St. Paul. The rate to Fargo then equaled the rate from San Francisco to St. Paul, plus the local rate from St. Paul back to Fargo. The complainant, thereupon, found himself entirely excluded from participation in the sugar trade outside of the city of Fargo itself. Then, too, owing to the system of tapering rates,[1] which was in force from St. Paul, the rate from San Francisco to St. Paul plus the local rate back to points both east and west of Fargo, was less than the rate to Fargo plus the local rate to the same point. Thus the entire wholesale trade of that section was transferred from Fargo to St. Paul.

The Commission found that the low rate to St. Paul was justified by the competition of sugar from the West Indies, which came via New York. But it held that this sort of competition was not of the kind which would create substantially dissimilar conditions within the meaning of the fourth section of the Act.

At the time this case was decided, the doctrine generally held by the Commission was that such dissimilar circumstances could arise only from the competition of water routes between the same points, or from the competition of carriers, not subject to the Act. The competition of markets was not considered capable of producing such dissimilar circumstances.

This case, when considered apart from other decisions of the Commission, warrants the severe criticism which

[1] A tapering rate is one which grows less per mile as the distance increases.

has been made upon it by Mr. H. R. Meyer and others, but it must be remembered that the Commission itself set aside this interpretation of the fourth section of the Act in subsequent cases, and it has since that time frequently held that market competition may produce circumstances which would justify a carrier in charging less for the longer distance.[1]

In this particular case, the railroads refused to obey the order, and the Commission appealed to the courts for its enforcement, but the matter has never been prosecuted vigorously, and is still pending.

### THE CARTAGE CASE

*Mary O. Stone* vs. *Detroit, Grand Haven and Milwaukee Railway Company.*[2]

This case resulted from an alleged violation of the long and short haul clause. For a long time it had been the practice of the defendant railroad to deliver goods to the doors of the consignees at Grand Haven, upon consignments from points east of Detroit, without charge for cartage. While the same rates were charged to Ionia, Michigan, which was less distant over the same line from the initial points of shipment, the same facilities of free delivery were not accorded.

The Commission decided that this practice amounted to a violation of the long and short haul clause. The free delivery, which was accorded at Grand Haven, was declared to virtually amount to a concession in the rate, equal to the cost of that delivery.

The Circuit Court sustained the order of the Commission, but it was reversed by both the Circuit Court of Appeals, and by the Supreme Court. The freight station

[1] Gardner and Clark *vs.* Southern Pacific Ry. Co., 10 I. C. C. Rep. 342. See also *In re* S. P. *et al.*, Ruling No. 787, An. Rep. of I. C. C. See also Kearney Case, 8 I. C. C. Rep. 481.

[2] 3 I. C. C. Rep. 613, April, 1890. 57 Fed. Rep. 1002, Nov. 1891. 74 Fed. Rep. 803, April, 1896. 167 U. S. 633, May, 1897.

of the defendant railroad at Grand Haven was not located near the centre of the business district. Instead of purchasing an expensive right of way into the heart of the city, as its competitors had done, the defendant railroad had preferred to pay the cost of cartage to the door of the consignee. It was also found that the station at Ionia was not so disadvantageously located, and the court accordingly justified the means which the railroad had employed for reaching the heart of the business district at Grand Haven, and it held that the same facilities of free delivery need not be accorded at Ionia. Furthermore, the court pointed out that the citizens of Ionia were not the real complainants, but the Michigan Central, the competitor of the D. G. H. & M. at Grand Haven.

### THE MIDDLESBORO CASE

*The Gerke Brewing Company* vs. *Louisville and Nashville Railroad Company et al.*[1]

In this case, the Commission merely reaffirmed its earlier construction of the fourth section of the Interstate Commerce Act, *i. e.* that competition of carriers subject to the Act is not sufficient in and of itself to produce dissimilar circumstances within the meaning of the Act. No decision was rendered in this particular case by the court, but as we shall see, this doctrine was overruled by the courts in subsequent decisions.

### THE SOCIAL CIRCLE CASE

*The James Meyer Buggy Company* vs. *Cincinnati, New Orleans & Texas Pacific Railway Company et al.*[2]

The rate on buggies from Cincinnati to Social Circle was $1.37 per 100 lbs. The rate to Atlanta through Social Circle was $1.07, while the rate to Augusta, 171 miles

[1] I. C. C. Rep. 593, 1893.
[2] 4 I. C. C. Rep. 744, June, 1891. 56 Fed. Rep. 928, June, 1893. 162 U. S. 164, March, 1896.

further, was the same as that to Atlanta. Moreover, the rate to Birmingham, Alabama, which was practically at the same distance as Atlanta, was only eighty-nine cents per 100 lbs.

The Commission held that the rate to Social Circle should not exceed the rate to Atlanta, and that the rate to Atlanta should not exceed $1.00 per 100 lbs.

The Circuit Court refused to sustain the order of the Commission on the grounds that it had erroneously interpreted the word "line," as used in the fourth section of the Interstate Commerce Act. The Circuit Court of Appeals set aside this ruling, and held that there was no justification for a greater charge to Social Circle than to Atlanta, but that the Commission had erred in fixing the maximum rate to Atlanta at $1.00. It was held that no satisfactory evidence had been presented before the Commission to show that the rate of $1.07 to Atlanta was unreasonable.

The Supreme Court sustained the Circuit Court of Appeals upon both of these points, thus for the first and only time upholding an order of the Commission where that order recommended changes in the published rates of carriers. In this decision also there are strong dicta to the effect that the Commission had not been delegated the power to fix rates.

### THE ALABAMA MIDLAND CASE

*The Board of Trade of Troy, Alabama*, vs. *Alabama Midland Railway Company et al.*[1]

The rates from Northern points to Troy, Ala., are constructed on the basis of the rate to Montgomery plus the local rate back to Troy. The rates from Troy to Southern ports equal the rate back to Montgomery, plus the rates from Montgomery to those ports. The same

[1] 4 I. C. C. Rep. 384, Aug. 1893. 69 Fed. Rep. 227, July, 1895. 74 Fed. Rep. 715, June, 1896. 168 U. S. 144, Nov. 1897.

principle of rate-making is in force throughout this whole section, and local points in every instance are charged the through rate to the nearest competitive point plus the local rate to the point of consignment.

The Commission decided that this practice was in violation of both the third and the fourth sections of the Act to regulate commerce. The kind of competition, which it was admitted was the controlling factor at Montgomery, was that of carriers subject to the Act, which, in the opinion of the Commission, did not constitute substantially dissimilar circumstances and conditions within the meaning of the fourth section of the Act, except "in rare and peculiar instances," in which cases it was the duty of the carrier to apply to the Commission for relief. Accordingly, the Commission ordered a reduction in the rate from Northern points to Troy, to the extent that they should not exceed the rates in force to Montgomery. Moreover, the Commission held that the refusal on the part of the carriers to grant a through rate from Troy to Southern ports, and the granting of such a rate to Montgomery and other cities, amounted to an undue preference within the meaning of the third section of the Act. A slight reduction was therefore ordered in the Troy rate.

This decision was not sustained by any of the courts of review. It was held that the lower rate to Montgomery was not the result of any malicious discrimination on the part of the railroads. Montgomery was a large distributing centre long before there were any railroads in that section of the country. It was situated upon a navigable stream which brought into play the force of potential water competition. Furthermore, the rate to Montgomery had been reduced by the competition of numerous railroads at that point. Contrary to the ruling of the Commission, it was held that such competition may cause substantially dissimilar circumstances within the meaning of the fourth section. The enforcement of the order of the Commission

at all the local points of the Alabama and Midland, would either drive that road into bankruptcy, or compel it to give up its share of the Montgomery traffic. In either case, higher rates would eventually result, especially if the road were compelled to give up its share of the through traffic, for that business, though done upon a small margin, nevertheless still allowed of some profit beyond the expenses of operation.

## THE SPOKANE FALLS CASE

*The Merchants' Union of Spokane Falls* vs. *Northern Pacific Railway Company et al.*[1]

The rates to Spokane were made on the basis of the rate from Eastern points to the coast, plus the local rate back to Spokane. The result of such an adjustment of rates was that the jobbers of the coast cities competed in the markets of Spokane with the jobbers of that city, while they had a practical monopoly of all the business at points west of Spokane, and owing to the system of tapering rates, they had a decided advantage in the trade with points east of Spokane. Such a situation of affairs has frequently been spoken of by Mr. H. R. Meyer, and by less astute railroad apologists, as most happy in that it promotes competition. It should be borne in mind, however, that it is only competition in the markets of Spokane which is promoted, while the entire wholesale business of the rest of the state is concentrated upon the coast. It would seem that a better state of competition would be one where each of these centres, enjoying a practical monopoly of its local business, should compete with the others in supplying the entire trade outside of these central distributing-points.

It was contended by the defendants that the lower rates to the coast were made necessary by the water competition

[1] 5 I. C. C. Rep. 478, 1892. 83 Fed. Rep. 249, 1897.

existing there. It was found that there were some two hundred commodity rates in force to the coast, which had been made in order to meet the water competition at that point. It appeared that the goods which were still carried at class rates were not of a character such as would admit of effective water competition, and the Commission, therefore, while justifying the lower commodity rates, which covered the bulk of the traffic to the coast, ordered the reduction of class rates to Spokane Falls to the extent that they should not exceed 82 per cent of the class rate to the coast.

This order was reversed by both the Circuit Court and by the Circuit Court of Appeals. Apparently the reasons for reversal were not entirely convincing, as the evidence before the court failed to show that there was important water competition with respect to the commodities the rates upon which were affected by the order. It was established, however, that the rates to Spokane were resonable when considered apart from the lower rates to the coast.[1]

### THE GRIFFIN CASE

*Brewer and Hanleiter* vs. *Louisville and Nashville Railroad Company et al.*[2]

The merchants of the city of Griffin, Georgia, complained that the rate from Cincinnati to Griffin was higher than the rate from Cincinnati to Macon, a point more distant from Cincinnati over the same line upon which Griffin is situated.

The Commission held that this practice was in viola-

[1] Since the passage of the new rate law in June, 1906, the Merchants' Union of Spokane has again brought its case before the Commission, upon practically the same showing of facts as in the case cited above. It will be extremely interesting to note whether the Commission will adhere to its former ruling in the case, and if so, whether the courts can find any grounds under the new law by which they may now overrule the Commission in this matter.

[2] 7 I. C. C. Rep. 244, June, 1897. 84 Fed. Rep. 258, Jan. 1898.

tion of both the third and fourth sections of the Act. Furthermore, it found that the rate to Macon was determined by agreement between the carriers rather than by competition. Admitting that the Georgia Central could not well afford to reduce its local rates, the Commission held as follows:

> The Macon rate is the result of agreement. The Central of Georgia Railway is a party to that agreement. If it has not sufficient influence to secure the adoption of such rates as will, under the law, yield it a proper revenue, that is the misfortune of those who have become the owners of the property which must be endured as every other misadventure of business is.

Accordingly the Commission ordered the defendant to cease charging more to Griffin than to Macon, and dismissed the case without prejudice to the railroad to apply to the Commission for relief from the operation of the fourth section.

The court found the facts different from those set forth in the findings of the Commission. The rate to Macon was in no way under the control of the Georgia Central, there being five railroads centring at that place. Water competition was also present during the greater part of the year. To comply with the order of the Commission, it would be necessary for the Georgia Central either to abandon its Macon business, or to operate its road at a loss. It was also shown that even if the Macon rate should be raised by agreement between the roads, that city would lose practically the whole of its trade to its competitors, Savannah, Eufaula, and Columbus. In such a contingency, there would be no advantage to the merchants of Griffin, since there was little probability that any portion of the trade which had formerly belonged to Macon would be secured by Griffin. Furthermore, the court added:

> The effect upon the defendant company would also be damaging, perhaps incalculably so; . . . how stands the trivial and

problematical advantage which Brewer and Hanleiter, and perhaps other Griffin merchants, might secure, when compared with the stupendous disadvantage which might result to the city of Macon, and to one of its principal railroads, if the competition of carrier with carrier, and market with market, ever present there, should be ignored by the courts? Shall the authorities of Government have no concern for the millions of capital invested or accumulated through long years of enterprise and diligent business exertion by the people of the latter city? Shall the millions which they have invested in railroads . . . to afford to the state great systems of transportation, result in their ruin? Shall Government undertake the impossible but injurious task of making the commercial advantages of one place equal to those of another? It might as well attempt to equalize the intellectual powers of its people. . . .

## GEORGIA RAILROAD COMMISSION CASES

*Georgia Railroad Commission* vs. *Clyde Steamship Company et al.*[1]
*Same* vs. *Ocean Steamship Company, etc.*

These cases are important, since in them the Commission adopted a peculiar interpretation of the statute, which made a great deal of trouble later. *In re* Louisville and Nashville R. R. Co. (1 I. C. C. Rep. 31), the Commission had held that in all cases of dissimilar circumstances within the meaning of the fourth section, the carriers themselves were justified in charging less for the greater distance, without permission from anybody. In overruling the doctrine which was set forth in this early case, the Commission now held as follows:

The carrier has the right to judge in the first instance whether it is justified in making the greater charge for the shorter distance, under the fourth section, in all cases where the circumstances and conditions arise wholly on its own line, or through

[1] These constitute seven cases brought by the Georgia Railroad Commission, all involving similar points. All were heard together. Five were carried to the courts and decisions were rendered in three of them. 5 I. C. C. Rep. 324, Nov. 1892. 88 Fed. Rep. 186, June, 1893. 93 Fed. Rep. March, 1899. 181 U. S. 29, April, 1901.

competition for the same traffic with carriers not subject to the act. In all other cases under the fourth section, the circumstances and conditions are presumptively dissimilar, and carriers must not charge less for the longer distance, except upon the order of the Commission.

The Commission refused to examine into the merits of the case, but it gave the railroads twenty days, either to cease charging more for the shorter distance, or to file a petition with the Commission for relief from the operation of the fourth section. The railroads refused to accept this ruling, and the Commission appealed to the courts to enforce its order.

The courts held that the Commission by this order had been attempting to legislate in a most extraordinary manner. Though a purely administrative body, it had proposed to determine in advance what should be the presumptive evidence of guilt, and it had attempted to compel the railroads to go to it for permission to do a thing which is nowhere forbidden.

An effort was made by the Commission to get the Supreme Court to examine into the merits of the various complaints, and to render a decision in accordance with substantial justice between the parties, but the court emphatically refused to perform this duty, which it held should have been performed by the Commission in the first instance.[1]

### THE CHATTANOOGA CASE

*The Board of Trade of Chattanooga* vs. *East Tennessee, Virginia & Georgia Railroad Company.*[2]

In this case the Commission decided that the conditions of railway competition, and the competition of

[1] In the Orange Routing Case (200 U. S. 356), the Supreme Court held that the courts might enforce an order of the Commission, even though the grounds upon which it was issued were insufficient, providing the order might be justified upon other grounds, not appearing in the findings of the Commission.

[2] 5 I. C. C. Rep. 546, Dec. 1892. 85 Fed. Rep. 107, Feb. 1898. 99 Fed. Rep. 52, Nov. 1899. 181 U. S. 1, April, 1901.

markets, might justify a greater charge to Chattanooga than to Nashville and Memphis, the more distant points. But as the railroad had not applied to the Commission for relief from the operation of the fourth section, an order was issued prohibiting the greater charge to Chattanooga. The enforcement of the order was suspended, so as to give the railroad an opportunity to apply for relief.

The lower courts sustained the order of the Commission, in this case, but they were reversed by the Supreme Court. If dissimilar circumstances within the meaning of the fourth section existed at the more distant point, they justified the lower charge for the greater distance. If then such circumstances existed at Nashville, the greater charge to Chattanooga was lawful, and the railroad could not be required to go to the Commission for permission to do a lawful thing. In all such cases, therefore, the railroads are the initial judges as to the dissimilarity of the circumstances.

## THE ST. CLOUD CASES

*George Tileston Milling Co.* vs. *The Northern Pacific Railway Company.*
*The City of St. Cloud, Minnesota* vs. *Same.*[1]

The rates on flour and upon other commodities from St. Cloud to Eastern points were higher than the rates from Minneapolis and other Minnesota points, which were more distantly situated. At the same time, the rates from Eastern points to St. Cloud were higher than those in force to Minneapolis.

In deciding this case, the Commission recognized the fact that the competition of carriers and of markets might justify a lower rate to Minneapolis, — and to other points near that city. But it held that in this particular instance, there was no justification for the higher rates to St. Cloud. The defendant carrier was the only one of the several

[1] Two cases 8 I. C. C. Rep. 346, Jan. 1900. Order affirmed, but not reported.

competing roads which centred at Minneapolis which charged more to intermediate points. To the claim of the defendant that its route was more circuitous than those of the other carriers competing for the traffic of Minneapolis, the Commission replied that to allow it the sole privilege of charging more for the shorter distance would give it an unfair advantage over its competitors. If reductions in the rate from Minneapolis should subject it to no loss with respect to its local business, while all its competitors were obliged to make corresponding reductions in their local rates, it would be in a position to absorb the whole of the Minneapolis traffic. Since the other roads had voluntarily agreed to obey the law, they should not be put to any disadvantage upon that account.

### THE SUMMERVILLE HAY CASE

*H. W. Behlmer* vs. *The Memphis and Charleston Railroad Company.*[1]

The rate on hay from Memphis, Tennessee, to Charleston, South Carollina, was 19 cents per 100 lbs., while the rate to Summerville, an intermediate point, was 28 cents. It was claimed that this was in violation of the long and short haul clause.

In deciding this question, the Commission recognized the fact that the competition of markets was the controlling force in determining the rate to Memphis, but it held that this sort of competition would not justify the higher charge to Summerville, without express permission from the Commission. Accordingly, it invited the railroad to apply for relief. This the railroad refused to do and the Commission appealed to the courts for a decree enforcing its order. Its decision was reversed by the Circuit Court, sustained by the Circuit Court of Appeals, and reversed again by the Supreme Court. It was held that the Com-

[1] 4 I. C. C. Rep. 521, June, 1894. 71 Fed. Rep. 835, Jan. 1896. 83 Fed. Rep. 898, Nov. 1897. 175 U. S. 648, Jan. 1900.

mission could not legally require the railroads to apply to it for permission to charge more for the shorter distance, for they were justified in doing this without permission from anybody, wherever dissimilar circumstances prevailed at the more distant point.

### THE PIEDMONT CASES

*E. D. McClelen* vs. *Southern Pacific Railway et al.*[1]

The complaint in these cases was that a higher rate was charged from Northern points to Piedmont than to Anniston, which was situated further south upon the defendant's line. It was urged that this constituted not only a violation of the fourth section of the Interstate Commerce Act, but also of the third section of that Act, since it gave rise to unreasonable prejudice against Piedmont as compared with Anniston. It was not contended that the rates to Piedmont were unreasonable *per se*.

The defendant railroads claimed that the practice was justified by the fact that the lower rate to Anniston had resulted from the competition of the Louisville and Nashville at that place. The Commission did not decide the case upon its merits, but issued a provisional order that the defendants should cease the practice, or apply to it for relief from the operation of the fourth section. The Circuit Court refused to sustain this order upon the same grounds as in the cases just cited.

[1] Two cases, 6 I. C. C. Rep. 588, June, 1896. 105 Fed. Rep. 103, Nov. 1900.

# CHAPTER V

## THE INTERSTATE COMMERCE LAW AND ITS INTERPRETATION BY THE COMMISSION AND BY THE COURTS (*concluded*)

We shall now take up those cases which deal with alleged discriminations between localities.

### THE NASHVILLE COAL CASE[1]

The rate upon that quality of coal known as the "run of mines," from the producing district in Western Kentucky to Nashville, was $1.00 per ton all the year round. The rate upon screened coal, however, was $1.15 in summer, and $1.40 in winter. The rates upon all grades of coal from the same points to Memphis was $1.40 the year round. It was contended that Nashville, being so much nearer the producing district, ought to have as much advantage over Memphis in the rate on screened coal, as it had in the run of mines variety.

The Commission held that the rate of $1.40 on screened coal to Nashville was unjust when compared with the Memphis rate. Accordingly, it ordered that the rate to Nashville should, in no season of the year, exceed $1.15, and that this rate should be proportionally reduced upon any reduction in the Memphis rate.

The Circuit Court, in setting aside the order of the Commission, severely and properly criticised that body for its attempt to make the Nashville rate proportionate to that to Memphis, where entirely different considerations entered as factors in determining the rate. The discrimination between the winter and summer rates was

[1] *In re* Alleged Unlawful Charges in the Transportation of Coal by the Louisville and Nashville R. R. Co., 5 I. C. C. Rep. 466, Oct. 1892. 73 Fed. Rep. 409, April, 1896.

not the kind of discrimination which was intended to be forbidden by the Interstate Commerce Act. In fact, it was found that such discrimination was highly advantageous, both to the railroads, and to the public at large.

## THE MINNEAPOLIS CASE

*The Chamber of Commerce of Minneapolis* vs. *Great Northern Railroad Company et al.*[1]

This case arose out of the struggle between Minneapolis and Duluth for the flour business of the Northwest. Duluth possessed the advantage of situation, being at the head of Lake Superior, while Minneapolis had the advantage of an earlier development of the industry.

After much warring of rates, the railroads of the Northwest agreed upon a division of the grain traffic of that section. This agreement provided that the rates upon grain from points in North and South Dakota, and from a section comprising a large portion of Minnesota, should be the same to Duluth as to Minneapolis. The Chamber of Commerce of Minneapolis complained that this was an unjust discrimination against that city, for most of the points to which the blanket rates were extended were from ten to forty per cent nearer Minneapolis than Duluth, and it was claimed that since Duluth had the advantage of being situated nearer the common market, Minneapolis ought not to be deprived of its advantage of situation nearer the sources of supply.

In deciding this question, the Commission stated that under the present circumstances, the milling trade of Minneapolis was bound to decline. So far as such a result should be attributed to the greater natural advantages of Duluth, nothing could properly be done to prevent it. But the natural advantage of situation of Minneapolis should not be taken away from it. A milling town possess-

[1] 8 I. C. C. Rep. 346, Nov. 1899.

ing great natural, acquired, and improved advantages for the carrying on of that industry, and favorably situated in point of distance to a large grain-producing region, is entitled to the benefits of its location, and carriers of grain to that point are not justified in making rates to competing towns, considerably more remote from the producing area, which destroy the advantage which the former town is entitled to enjoy. The Commission, therefore, ordered that the rates on grain to Minneapolis and Duluth should be adjusted upon the basis of their respective distances.

This decision has been severely criticised by Professor H. R. Meyer.[1] He would have us believe that if the Commission had the power, it would seek to limit markets and to give to every competing industry the advantages which it possesses over others in point of distance.

A short time after this decision, a case arose in which the Chamber of Commerce of Minneapolis strongly objected to the application of the very principle for which it had contended. When Milwaukee and LaCrosse, its competitors upon the south, sought to secure for themselves the advantages which they possessed over Minneapolis in point of distance, the Chamber of Commerce of the latter city requested that the order of the Commission which had been recently made in its favor should not be enforced. Accordingly, the case was not pressed before the courts.

### THE SAVANNAH NAVAL STORES CASE

*The Savannah Bureau of Freight and Transportation* vs. *Louisville and Nashville Railroad Company et al.*[2]

For a long time the rate on cotton from points in Florida to Savannah had been $2.75 per bale, while the

[1] H. R. Meyer, *Government Regulation of Railway Rates*, pp. 397–405.

[2] 8 I. C. C. Rep. 377, 1900. 118 Fed. Rep. 613, 1902.

rates to New Orleans and Mobile were $2.50 and $2.00 respectively. Under these rates, competitive conditions had grown up which divided the business fairly equally between the various commercial centres.

The Louisville and Nashville, however, in order to secure for itself practically the whole of this business, refused to continue the joint rate which had enabled the cotton to move to Savannah at $2.75 per bale. The result was that the Savannah rate was advanced to $3.30 per bale, a rate which was practically prohibitive. As the rate to New Orleans and to Mobile remained the same, the whole of the traffic now moved in that direction, and the Louisville and Nashville thus obtained the full income from the haul, while if the cotton had been carried to Savannah it would have been compelled to divide the rate with the other joint carriers.

The Interstate Commerce Commission decided that discrimination between different localities, for such reasons as had influenced the Louisville and Nashville, was unjust within the meaning of the Interstate Commerce Law. Though the distance to New Orleans was greater, it recognized the legality of a lower charge to that point in order to enable that city to share in the business. But the advance in the Savannah rate to a point beyond $2.75 per bale, which resulted in the exclusion of Savannah from a participation in that business, was unlawful and unduly discriminatory toward that city. The Circuit Court sustained the order of the Commission, and there was no appeal.

### THE DANVILLE CASE

*The City of Danville et al.* vs. *Southern Railway Co. et al.*[1]

The rates on sugar and other commodities from Northern and Eastern cities to Danville, Virginia, were constructed upon the basis of the local charge to the Ohio

[1] 8 I. C. C. Rep. 409, 571, 1900. 122 Fed. Rep. 800, 1903.

River plus the local charge from the Ohio River to Danville, while Richmond, Lynchburg, and other Virginia cities enjoyed a much lower through rate. On the other hand, the rates from Southwestern points to Danville consisted of the through rate to Lynchburg plus the local rate back over the same line to Danville. The rate on tobacco to Western points was out of all proportion higher at Danville than at Lynchburg. It thus appeared that the city of Danville was handicapped upon every side.

In deciding this case, the Commission recognized the fact that competitive conditions justified lower charges to Richmond and Lynchburg, but it refused to recognize the legality of a discrimination as great as had been practiced by the railroads:

> If the carriers desire to make rates in that manner, they must so adjust their charges as not to annihilate the city of Danville.

Accordingly, the Commission ordered that the rates from the South and West to Danville should not exceed the rates from the same points to Lynchburg by more than ten per cent, and that the rate on tobacco from Danville to the West should not exceed the rate from Lynchburg by more than fifteen per cent.

The Southern Railway refused to obey this order, and the Commission began suit for its enforcement. Both the Circuit Court and the Circuit Court of Appeals refused to sustain the order of the Commission. It appeared that the Southern Railway, which had refused to obey the order, had had nothing to do with the reductions of the rates which had taken place at Lynchburg and Richmond. It had come into the field as the last competitor, and had accepted the rates to these cities, just as it had found them. Since these rates were therefore beyond the control of the defendant carrier, the rate to no other point upon its line could be shown to be unlawfully discriminatory when compared with them. As the Commission had not found

the rate to Danville to be unlawful *per se*, its order should be set aside. An appeal is now pending before the Supreme Court.

### THE LAGRANGE CASE

*Fuller E. Calloway* vs. *Louisville and Nashville R. R. Co. et al.*[1]

The complaint in this case was that the rates from New Orleans to LaGrange, Georgia, were unjust and unreasonable in themselves, and that they were unjustly discriminatory, as compared with the rates to Hogansville, Newman, Palmetto, and Fairburn, all of which points were situated upon the defendant's line at a greater distance from New Orleans.

It appeared that these points enjoyed lower rates by virtue of the fact that they were nearer to Atlanta, the rate to LaGrange and to all the aforementioned points being constructed upon the basis of the rate to Atlanta plus the local rate from Atlanta back to the point in question.

The Commission recognized that a lower rate to Atlanta than to these intermediate points was justified by the competition of carriers and of markets, but it held that the rate to Atlanta was not lower than it should be. If, then, the rate to Atlanta was reasonable, higher rates to intermediate points, where the cost of carriage was less, must be unreasonable. Moreover, the defendant railroad had earned twelve per cent upon its capital stock for a long time, and this fact tended to show that the highest rates which were in force upon its line were unreasonable. Furthermore, even though Atlanta might be entitled to lower rates than LaGrange, owing to the competition of carriers at that place, the intermediate points between Atlanta and LaGrange possessed no such advantages, and were, therefore, not entitled to lower rates than LaGrange.

The Circuit Court sustained this order, assuming that

[1] 7 I. C. C. Rep. 431, Dec. 1897. 102 Fed. Rep. 709, Dec. 1899. 108 Fed. Rep. 988, May, 1901. 190 U. S. 273, May, 1903.

the findings of the Commission were *prima facie* correct. This decision was reversed, however, by the higher courts upon the grounds that the evidence had failed to show any unreasonable prejudice against LaGrange. The Atlanta rate had resulted from competition, and was therefore justified. This rate plus the local rate back to LaGrange was less than the rate to Montgomery plus the local rate to LaGrange, Montgomery being the nearest competitive point to the southwest of LaGrange in the direction of New Orleans. Thus, owing to the low rate prevailing from New Orleans to Atlanta, LaGrange enjoyed a rate lower than it otherwise would. The other local points between LaGrange and Atlanta were entitled to a lower rate than LaGrange by virtue of their being situated nearer Atlanta. Furthermore, the court held that there was nothing in the evidence to warrant the ruling that the rates to LaGrange were unreasonable in themselves.

While the findings of the court in this case seem, on the whole, to be correct, there is no justification for the assumption by the court that LaGrange could have no grounds of complaint as long as the low Atlanta rate reacts upon the rate to LaGrange and makes it less than it would otherwise be. How could it be proved that the LaGrange rate would otherwise have been equal to the rate to Montgomery, plus the local rate from Montgomery to LaGrange, which was a pure assumption on the part of the court? In fact, under the system of tapering rates, which is generally applied throughout the country, the rate to LaGrange would have been considerably less than this.

But even if it were true that LaGrange enjoyed lower rates than it otherwise would, it does not necessarily follow that the people of LaGrange could have no just grounds of complaint. The slight reduction in the rates to LaGrange would be of no benefit whatever, if the business of that city were entirely ruined by greater reductions to its competitors. If the principle for which the court con-

tended were once fully established, railroads might commit the grossest discriminations between localities, and there would be no means of remedy.

### THE KEARNEY CASE

*A. J. Gustin* vs. *Burlington and Missouri River Ry. Co. et al.*[1]

The rate on sugar from the coast to Omaha was fifty cents per 100 lbs., while the rate to Kearney, Nebraska, 196 miles nearer San Francisco, was twenty-seven cents higher, or seventy-seven cents per 100 lbs. The merchants of Kearney proceeded against the railroads upon three grounds: first, that the rate to Kearney was unreasonable *per se;* secondly, that the rate of seventy-seven cents to Kearney, and of only fifty cents to Omaha, was an unjust discrimination against Kearney; and thirdly, on the ground that this practice amounted to a violation of the long and short haul clause. It was argued that the conditions at the two points were substantially similar, since competition appeared to exist at each. It was contended that the only difference was one which was not recognized by the statute, namely, an agreement upon the part of the carriers to maintain rates at Kearney, and the failure to reach such an agreement at Omaha.

The Commission held as follows: First, that there was no case against the Burlington, as Kearney was situated upon a branch of that line over which the through traffic from the coast did not pass. Secondly, though considerable evidence was offered to show that the rate to Kearney was unreasonable *per se*, the Commission refused so to hold. In the third place, it was held that the lower rate to Omaha was justified and made necessary in order to enable the sugar from the West to be sold in competition with sugar brought in from the East and South by river and rail. It was also found that the rates from

[1] 6 I. C. C. Rep. 148, March, 1894. 64 Fed. Rep. 723, Dec. 1894.

the East being higher to Kearney, the same sort of competition did not exist at that place. Finally, the Commission decided that, while some higher rates to Kearney were justifiable, the differential of twenty-seven cents per 100 lbs. was too great, and constituted an unjust discrimination. Accordingly, it ordered that the rate to Kearney should not exceed the rate to Omaha by more than fifteen cents.

The Circuit Court refused to sustain this order. If as the Commission had held the rate of fifty cents per 100 lbs. to Omaha was justified by commercial conditions, no rate could be declared unjustly discriminatory when compared to it, unless it could be shown that the same conditions applied. The court refused to take notice of additional testimony which was presented to it tending to show that the rate to Kearney was unreasonable *per se*, for the case had not come to it upon those grounds, and it held that such points should be first decided by the Commission.

## THE HAMPTON CASE

*Board of Trade of City of Hampton, Florida*, vs. *Nashville, Chattanooga & St. Louis Railway.*[1]

In this case, we have another of those instances in which the Commission, in attempting a literal interpretation of the Interstate Commerce Act, has proceeded upon a principle, which, if it had been generally enforced, would have revolutionized the whole system under which our commercial and industrial development has taken place.

There was complaint of higher rates to Hampton, Florida, an inland point, than to Palatka, which was situated upon the seaboard and enjoyed the advantages of water competition. The Commission held that some higher rates to Hampton were justified, owing to the fact of its inland location, but they criticised that system of

[1] 8 I. C. C. Rep. 503, March, 1900. 120 Fed Rep. 934, Feb. 1903.

rate-making whereby the Hampton rate equaled the rate to Palatka plus the local rate back to Hampton. In this way the Hampton merchants were prevented from competing with those of Palatka, except within the city of Hampton itself. Accordingly, this was held to be an unjust discrimination against the city of Hampton, and an order was issued to the effect that the rate to Hampton should not exceed that to Palatka by more than ten per cent. Both lower courts of review refused to sustain this order, on the ground that the low rate to Palatka had resulted from water competition, and there was no justification for an attempt to put an inland town upon an equal footing with one upon the seacoast.

### THE WILMINGTON CASE

*The Wilmington Tariff Association* vs. *Cincinnati, Portsmouth & Virginia Railway Company* [1]

In this case it appeared that the rates to Wilmington from Chicago and St. Louis were made upon the basis of the local charge to the Ohio River plus the local charge from the Ohio River to Wilmington, while the rates from the same points to Norfolk and other Virginia cities were constructed upon the basis of a much lower through schedule, the carriers north of the Ohio, accepting much less than their local charges as their share of the through rate.

The Commission held that while the rates to the latter cities were governed by the forceful conditions of competition, practically the same competitive conditions prevailed at Louisville and Cincinnati as at St. Louis and Chicago. It was held that whatever constituted a fair basis for the differential between Norfolk and Wilmington in the rates from Cincinnati and Louisville ought also to constitute a fair basis for the differential between Norfolk and Wilmington in the rates from Chicago and St. Louis. Accordingly, it held that the rates from Chicago and St. Louis to Norfolk

[1] 9 I. C. C. Rep. 118, Dec. 1901. 124 Fed. Rep. 624, Aug. 1903.

should not exceed the rates from the same points to Wilmington by more than thirty-five per cent, which was the existing differential between these points from Louisville and Cincinnati.

The Circuit Court and the Circuit Court of Appeals refused to enforce this order on the ground that keener competition existed at Norfolk and Richmond than at Wilmington. Wherever competition is present at two points there is no law which could enforce an equal reduction of rates in both cases. Therefore, no unjust discrimination results if competition causes a greater reduction in one case than in the other.

The next group of cases which will be taken up involves alleged unjust discrimination between commodities.

## THE WINDOW-SHADES CASE

*Alanson S. Page* vs. *Del., Lack. & Western R. R. Co. et al.*[1]

The complaint in this case arose from the fact that window-shades were placed in the first class, while shade-cloth, window-hollands, and similar material enjoyed a much lower rate, being placed in the third class. The Commission, after investigating the facts, decided that window-shades ought to have as low a rate as that on window-hollands, etc.

The Circuit Court, without investigating the real merits of the case, refused to enforce this order, since it gave no permission to the railroads to charge a higher rate upon the more expensive grades of window-shades.

It would seem that the court here strained a point in order to have a pretext for overruling the order of the Commission. Absolute justice in the making of rates is an impossibility. It may be true that the more expensive grades of shades are able to stand a higher rate, perhaps they ought to do so, but such a principle of charging according to the

[1] 6 I. C. C. Rep. 148, March, 1894. 64 Fed. Rep. 723, Dec. 1894.

quality of the article could never be enforced in rate-making. As there are many grades of almost every commodity, it is at once evident that it would be impossible to adjust rates upon the basis of the valuation of the particular grades composing the various shipments in question. If this principle of charging according to the value of the article transported were carried to its logical conclusion, it would mean that a great many different rates would have to be made for every commodity, the rate in each case depending upon the quality of the goods composing the particular shipment.

Such a system would be utterly impracticable. It would lead to continual disputes between the railroads and the shippers as to the quality of the goods offered for shipment. Moreover, large shippers would be continually taking advantage of such a situation in order to secure undue preference. The secret rebate would then take the form of a lower valuation of the commodities composing the shipments of the favored individual. Such discriminations would be exceedingly hard to detect, and it would be even more difficult to prove criminal intent, as the railway agent could plead ignorance of the real value of the goods.

In fact, the railroads have never attempted to adjust rates to the value of the particular grade of the commodity transported, unless the difference in quality is such as to constitute essentially two different commodities, such as rough and finished lumber. Railroads have always charged the same rates for the prime load of steers, which may sell for $6.50 per 100 lbs., as for the canning cattle which will not bring over $2.00. Endless confusion would result from an attempt to adjust rates upon any other basis. And yet we find that the court set aside the order of the Commission in this case on the ground that it did not allow for a higher rate upon the more expensive grades of window-shades, though it had always been the practice of the railroads to charge a uniform rate upon all shades. Indeed a decision of this character seems to give some foundation

for the charges which are heard in several quarters to the effect that the courts have been jealous of the judicial power exercised by the Commission and have sought to discredit it by overruling it whenever possible.

## THE OIL CASE

*The Independent Refiners' Association of Titusville, Penn.*, vs. *New York and Pennsylvania Railroad Company et al.*[1]

This case is unimportant in the form in which it finally came to the courts, but its earlier development is extremely interesting, in that it illustrates one of those practices under which the Standard Oil Company was built up. When tank-cars first began to be used in the transportation of oil, they were not furnished by the railroads, but by the individual shippers. The carriers paid the owners of the cars a certain mileage, and gave them the sole privilege of the use of such cars.

As a matter of course, few refiners, other than the Standard Oil Company, were able to furnish cars of this description in proportion to their needs. Accordingly, when the weaker refineries were refused the use of these cars, they had no recourse but to ship in barrels. But the railroads, in order to give preference to the owners of tank-cars, discriminated in their favor. Thus the hypothetical weight which was assumed for a barrel of refined petroleum as compared with that of the same kind of oil in tanks operated decidedly to the advantage of the latter. In the second place, the independent shipper was charged for the weight of the barrel, while no charge was made for the weight of the tanks.

Thus the weaker refineries soon found themselves unable to compete with their strong rival. They had no

[1] 6 I. C. C. Rep. 378, Oct. 1895. 137 Fed. Rep. 343, May, 1905. See also: 1 I. C. C. Rep. 503. (Rice *vs.* L. & N. *et al.*) 5 I. C. C. Rep. 193. (Rice *vs.* Cin., W. & B. *et al.*) 5 I. C. C. Rep. 415. (Refiners of Titusville *vs.* W. N. Y. & Penn.) 137 Fed. Rep. 343.

recourse but either to go out of business or to apply to the Commission for an order which would place them more nearly upon a basis of equality with their favored competitor. They urged that the charge for the weight of the barrel was an unjust discrimination in favor of those shippers who were able to use tank-cars. It was shown that the expenses of operation were perhaps lower upon barrel than upon tank shipments, for the car which was used for the former could be utilized upon the return haul.

The Commission, in numerous cases which came before it, decided that this practice was an unjust discrimination against the independent refiners. Accordingly, it ordered that the railroads should either furnish tank-cars to all applicants upon equal terms, or, in case such cars could not be furnished when applied for, they should charge the same rate upon oil in barrels as upon oil in tanks, thus making no charge for the weight of the barrel.

The equity of this ruling has not been seriously questioned. It is one of those cases which illustrate the necessity of some sort of government control. This particular case, however, as it was finally carried to the courts, involves the payment of damages to those shippers who had been unlawfully required to pay for the weight of the barrels. The Commission ordered that such damages should be paid upon shipments during the entire period 1888 to 1894. The railroads urged that damages could not accrue to the shipper, for the alleged unlawful charges had been paid by the consignees, and not by the shippers, though of course it was not denied that the shipper was the real party injured. The railroads also claimed that the subsequent lease or reorganization of their properties exempted them from liability for such damages. The Commission overruled these objections, and upon a refusal of the railroads to pay the damages awarded, it attempted to recover for the complainants in the courts, but in this it was unsuccessful. An appeal was taken to the Supreme Court of the United States, and the case is now pending.

## IMPORT RATES CASE

*New York Board of Trade and Trans.* vs. *Penn. Ry. Co. et al.*[1]

This case grew out of an attempt upon the part of the various roads leading to Philadelphia, Baltimore, and New Orleans to increase their share of the export trade in grain. It was found that ocean vessels would not come to these ports for cargoes of grain, at the prevailing ocean rates, unless they could secure a return cargo from Europe to the port in question. In order to divert such traffic to their respective ports the railroads found it to their advantage to make through rates upon import traffic which in themselves were frequently unprofitable. For this reason they could not afford to extend the same rates to domestic traffic.

Upon this point the Commission attempted a literal interpretation of the Interstate Commerce Act. It was held that the words "a like kind of traffic," as they occur in section 2 of the Act, do not mean traffic that is identical, but traffic that is of like kind in the elements of a "fair and just classification." In this respect, import and domestic traffic in the same kind of commodities were of "like kind" within the meaning of the Act, and any discrimination by the domestic carriers between these two similar kinds of traffic was therefore unlawful.

The Commission also strongly urged the disadvantage to which the domestic producer was put, showing that in many cases the through rate from foreign countries was much lower than the domestic rate from the seaboard to the interior. The practice of charging more upon domestic traffic directly contravened the policy of Congress, which essays to protect the home industry as against the foreign.

Most of the roads temporarily obeyed the order of the Commission, but the Texas Pacific having refused, suit

[1] 4 I. C. C. Rep. 477, 1891. 52 Fed. Rep. 187, 1892. 57 Fed. Rep. 948, 1893. 162 U. S. 197, March, 1896.

was brought for the purpose of compelling it to obey. The Circuit Court and the Circuit Court of Appeals sustained the order of the Commission, but the Supreme Court reversed it in a memorable decision, from which the following is quoted:

> The effort of the Commission by a rigid general order to deprive the inland consumers of the advantage of through rates, and thus to give the advantage to the traders of the large seaboard cities, seems to create the very mischief which it was one of the objects of the Act to remedy.
>
> As we have already said, it could not be supposed that Congress, in regulating commerce, would intend to forbid or destroy an existing branch of commerce of value to the common carriers and to the consumers within the United States. Clearly, express language must be used in the Act to justify such a supposition. . . . It is self-evident that many cases may and do arise where, although the object of the carriers is to secure traffic for their own purposes, and upon their own lines, yet, nevertheless, the very fact that they seek by the charges they make to secure it operates to the interest of the public. . . .
>
> That if the Commission instead of confining its action to redressing, upon complaint made by some particular shipper, firm, corporation, or locality, some specified disregard by the common carrier of the provisions of the Act, proposes to promulgate general orders which thereby become rules of action to the carrying companies, the spirit and letter of the Act require that such orders should have in view the purpose of promoting and facilitating commerce and the welfare of all to be affected, as well the carriers as the traders and consumers of the country. . . . The mere fact that the disparity between the through and local rates was considerable did not of itself warrant the court in finding that such disparity constituted an undue discrimination. . . .

## THE HAY CASE

*The National Hay Association* vs. *Lake Shore and Michigan Southern Railway Company et al.*[1]

Among the results of the general changes of classifica-

[1] 9 I. C. C. Rep. 264, Nov. 1902. 134 Fed. Rep. 142, 1904. 202 U. S. 603 1905.

tion by the Official Classification Committee, January 1, 1900, hay was raised from the sixth to the fifth class, which meant a corresponding advance in the rates upon that commodity.

The Interstate Commerce Commission, after an extensive examination of the facts, decided that this advance was unjust. It was shown that while hay was of slightly greater expense to handle [1] than grain and other articles of the sixth class to which hay formerly belonged, its low value in proportion to its bulk entitled it to a consideration at least as favorable as that accorded the cereals. It was also shown that the advanced rate was practically prohibitive upon the movement of hay from the West to the Eastern States, since the markets in the latter section could be supplied more cheaply with hay from Argentine and Canada, notwithstanding the duty of $4.00 per ton.

The Circuit Court refused to sustain the order of the Commission, upon the ground that there could be no unjust discrimination between commodities so widely differing in character as hay and grain, or other commodities of the sixth class. Without expressing an opinion as to the reasonableness of the existing rates upon hay *per se*, the court held that the order of the Commission requiring the removal of hay from the fifth class and placing it in the sixth exceeded the powers of that body, in that it amounted to a fixing of the rate for the future, declared by previous decisions not to be within the scope of its powers.[2]

We shall now take up a class of cases in which the reasonableness of the rate *per se* was questioned.

[1] The difference in the assignable cost to the railroad is practically nothing, for the handling is done by the shippers.

[2] This decision was subsequently affirmed by the Supreme Court. (202 U. S. 613.)

### THE DELAWARE GRANGE CASE

*The Delaware State Grange Railroad Company* vs. *New York, Philadelphia and Norfolk Railroad Company et al.*[1]

Complaint was made by the Delaware State Grange that rates were higher upon fruits and vegetables from points in Delaware to New York than from Norfolk, which was situated upon the same line at a greater distance from New York. It was also shown that certain articles of common consumption in New York could not be produced in Delaware, owing to these excessive rates.

The Commission held that the lower charge from Norfolk was justified by the water competition which existed there, but that some of the rates from points in Delaware were unreasonable *per se*, owing to the fact that they allowed no profit to the producers of certain commodities. The Circuit Court overruled this decision upon the ground that the standard which the Commission had used in determining the question as to the reasonableness of the rate was not one which could properly be used in the determination of such cases.

### THE COXE COAL CASE

*Coxe Brothers* vs. *Lehigh Valley Railway Company.*[2]

The rate on anthracite coal from the Lehigh anthracite district to Perth Amboy, New Jersey, a distance of 149 miles, was $1.54 per ton. Complaint was made that this rate was excessive. It appeared that the average rate upon all other commodities was much less than the rates which were charged upon coal, and that the existing rates on coal represented a considerable advance over those which had prevailed previous to 1887. The evidence also showed that the defendant railroad company was also

[1] 4 I. C. C. Rep. 588, 1890. Court decision not reported. See 7th An. Rep. of I. C. C. p. 29.
[2] 4 I. C. C. Rep. 535, 1891. 74 Fed. Rep. 784, 1896.

engaged in the mining and selling of coal, and that, owing to this excessive rate, the independent operators were unable profitably to compete with the railroad company in the production of that commodity, but were forced to close down or to sell out their properties upon whatever terms the railway company chose to dictate.

From the official report of the railway company it appeared that the average receipts per ton-mile were 12 mills on coal, and only 9.58 mills upon all other classes of freight, though the expenses of operation were .83 mill less per ton-mile on coal than on other kinds of merchandise. This anomaly appeared to be directly out of harmony with the general practice of railroads, which is to make a much lower rate upon such bulky products as coal than upon other commodities of a higher grade. It would therefore seem that the high rate upon coal was made, in this particular instance, for the express purpose of enabling the Lehigh Company to eliminate competition in the mining and selling of coal.

The Commission decided that this rate on coal was unreasonable *per se*, and ordered a reduction. The Circuit Court and the Circuit Court of Appeals overruled this order upon the grounds that the Commission had used an erroneous principle in its determination of the operating expenses on the transportation of the coal the rates upon which were in question. It appeared that the report of the railway company showed that the operating expenses for the transportation of coal over the entire system were 56 per cent of the gross receipts derived from such operation. The Commission assumed that the operating expenses over this particular part of the system bore the same relation to the rates charged as the report of the company showed for the entire system. It was upon the basis of this calculation that a reduction was ordered.

Without discussing the merits of the case, the court held that this assumption upon the part of the Commission was

unwarranted, and accordingly it refused to enforce the order. This case illustrates the extreme difficulty of determining a standard by which a given rate may be adjudged unreasonable.

## THE IRON RATES CASE

*The Colorado Fuel & Iron Company* vs. *Southern Pacific Railway et al.*[1]

In this case we have what seems to be a clear instance of extortionate rates. Previous to 1896, the rate on iron and steel from Pueblo, Colorado, to the Pacific Coast was $1.60 per 100 lbs. At the same time, the rates from Chicago and eastern points to the coast were fifty cents per 100 lbs. on iron and iron products, and sixty cents on steel. This discrimination practically prohibited the Coloardo Fuel and Iron Company from competing with Eastern manufacturers in supplying the extreme Western States with these important products. The market of the Colorado producers was therefore limited to a very small area in the immediate vicinity. Not only was it shown that it was impossible for the Colorado producers to compete with the steel manufacturers of the East, but the evidence showed that foreign competitors, enjoying the low ocean rates to the Pacific Coast, could easily undersell the Colorado Fuel and Iron Company in that market, handicapped as it was by these excessive rates.

Upon a preliminary examination, this would appear to be a rather anomalous situation. The whole history of railroading in America is full of instances showing the tremendous efforts which the roads have made, both by extending low rates and better facilities, to develop traffic and to stimulate industry in those places where the principal obstacle has been that of distance. Here is an instance of

[1] 6 I. C. C. Rep. 488, Nov. 1895. 74 Fed. Rep. 42, Oct. 1898. 101 Fed. Rep. 779, April, 1900.

an industry, richly endowed with the natural advantages of large deposits of coal and iron ore at its very door, absolutely prevented from expansion by railroad policy.

It is difficult to assign a cause for this apparently wide divergence from the general practice of railroads. We may be sure, however, that it was not an oversight upon the part of the railway managers, for the matter of the advisability of lower rates from Pueblo had been repeatedly presented to them.

It is quite possible that the railroads were not at liberty to make rates upon pure business principles. Few realize how completely the railroads are at the mercy of certain large shippers. In fact, they dare not do anything against the will of those shippers who control a considerable portion of the traffic, for if they did, the offending road would soon find itself deprived of an important item in its competitive business. It would have been an easy thing for the Eastern steel manufacturers to intimate to the roads having Denver connections, all of which are also carriers of transcontinental traffic, that if the Colorado Fuel and Iron Company should be admitted as a competitor in the trade with the coast, the steel from the East would go to the coast by the northern routes. The railroads which had the Colorado connections could ill afford to lose their share of the traffic in iron and steel from the East. Therefore there was no other course for them but to do as they did, and exclude the Colorado Fuel and Iron Company from competing for the trade with the coast.

But whatever may have been the cause of this discrimination, it is at once evident that it would have been of advantage to the railroads themselves, and in fact to everybody but the Eastern steel magnates, if a rate could have been secured which would have enabled this traffic to move. There can be no doubt but that the disadvantage to which the Colorado producers were put was a real hardship, entirely unjustified by any legitimate conditions.

It would, indeed, be a rather pessimistic view of the situation to hold that the public may devise no remedy for conditions of this character, which have frequently occurred elsewhere, and which may occur again with more insidious results in the future. Now let us look at the remedy which was available under the present law.

The Colorado Fuel and Iron Company applied to the Commission for relief. In November, 1895, the Commission rendered a decision providing that the rates from Pueblo to the coast should not exceed 45 cents per 100 lbs. on steel, and 37½ cents per 100 lbs. on iron and iron products, which amounted to just 75 per cent of the existing Chicago rate. This order the railroads refused to obey, and perhaps rightly enough, for it was too radical in its character. While the case was pending before the courts, the roads voluntarily adopted the schedule which had been recommended by the Commission. These rates remained in effect for two years, when the Southern Pacific gave notice of an advance in the rate from Pueblo to 60 cents upon steel rails and fastenings, and to 75 cents upon other steel and iron products.

Suit was immediately brought by the plaintiff in order to secure an injunction against the collection of the increased rate, and to collect damages. The District Court refused to award damages, but issued the desired injunction. Both parties appealed. The Circuit Court of Appeals overruled the order of the Commission upon both points. It was substantially held that the courts have no power to enjoin the collection of an unreasonable rate. Upon this point the court took a rather anomalous position. It was held that a rate *per se* could not be unlawful. It was only the act of charging an unreasonable rate which might be so declared, and that could apply only to transactions in the past. The collection of the same rate the next day or the next hour could not be declared unlawful in advance, for, in that case, the courts would be set-

ting a rate for the future. This the courts may not do, since setting a maximum rate for the future is a legislative, and not a judicial function. Hence the only remedy for an injured shipper lies in an action to secure damages. Upon this point, the court said in part:

> When a rate that has been exacted or demanded is challenged on the ground that it was unreasonable or unjust, it is within the province of a court or jury to determine the issue so raised, and to redress the wrong if one has been committed. But before an unreasonable rate has been either paid or demanded, or an actual tender of merchandise for shipment, it is not within the legitimate province of a court of equity to interpose and fix a maximum rate, and thereupon enjoin the carriers from demanding more than the rate so established. . . . It is tantamount to an exercise of legislative power of prescribing rates, neither of which powers belongs to a court of equity. . . .
>
> Aside from the foregoing considerations, we perceive no reason why the remedy at law should be pronounced ineffectual or inadequate, a single verdict before a jury establishing the unreasonableness or discriminatory character of the proposed rate would probably lead to a withdrawal of the rate, and avoid the necessity of further action.

The adequacy of the remedy here proposed by the court has been strongly questioned. The court seems to overlook the fact that the payment of damages in such a case seldom, if ever, rights the wrong which has already been committed. The real party injured is the consumer, and the payment of damages is usually a bonus to the producer or to the shipper, who usually has already recouped himself for all excessive charges in the price of the product. In other kinds of unlawful practices, remedy in the courts of law has often been found inadequate. Where such an unlawful practice is of great advantage to the perpetrator, and the damage falls upon the public at large, or upon a large group of individuals, each one of whom receives but an insignificant portion of the total damage accruing, which may be very large in the aggregate, the perpetrators

of the wrong often prefer to pay the damages awarded in individual suits, rather than to cease the unlawful practice. It is owing to this fact that government by injunction of the courts of equity has become a most important part of our judicial system.

Whatever may have been the fact as to the law in the case, it would seem that the court was clearly wrong as to the adequacy of the remedy proposed. The individual who buys the bread is not going to law about the rates upon wheat. No better illustration of a situation where control by injunction is necessary can be given than the enforcement of excessive and unreasonable railway rates. The remedy through the collection of damages in individual suits has proved wholly inadequate. That which the shipper wants is adequate protection from extortion in the future to the extent that he may place some dependence in the stability of rates, rather than a means of collecting paltry damages for excessive charges in the past, which may fall far short of compensating him for the damage which his business may have suffered. The remedy which the courts here suggest has been provided for in the law since 1887, and yet there are only two cases where damages have been sought before the Federal courts, and in both of those cases the complainant was unable to recover. The Interstate Commerce Law provides that rates shall be reasonable and not unduly discriminatory, and yet the court here declares that it has no power to enjoin the perpetration of an unlawful practice of this character. Fortunately this decision has not been upheld in other cases before the Federal courts, and since the passage of the Elkins Law, the right of the court to issue an injunction in such a case is established beyond all reasonable doubt.

An appeal from this decision was taken to the Supreme Court, but upon the formation of the Steel Trust, a private compromise between the contending parties prevented the final decision of the interesting points at issue.

## THE CATTLE RAISERS' ASSOCIATION CASE

*The Cattle Raisers' Association of Texas* vs. *Fort Worth and Denver Railway Company et al.*[1]

Prior to 1894, the Union Stock Yards and Transit Company had rendered switching service upon live stock consigned to Chicago free of charge. At that time, however, a trackage charge, ranging from forty to seventy-five cents per car each way, was imposed. In order to meet this additional expense, the railroads centring in Chicago imposed a terminal charge of two dollars upon all shipments to Chicago. As no such charge was imposed at other packing-centres, the imposition of this terminal fee was regarded as a direct discrimination against Chicago, and a bitter protest arose. The Commission, after investigating the facts, decided that the only justification for the imposition of this charge was the new trackage charge which the railroads using this terminal were compelled to pay, and since this did not average over one dollar per car, the one dollar which was charged in excess of that amount was unreasonable, and therefore unlawful.

This decision was reversed by all three courts of review, on the ground that the Commission erred in considering the terminal charge as a separate item from the remainder of the through Texas rate. As it appeared that in 1896, there had been a reduction of from $12.00 to $15.00 per car in the through rate, it was held that the cattle-raisers had no ground to complain. Several points, however, were left undecided, and the case has since come up before the Commission, and some of the points at issue are still pending. Some of the questions which are yet to be decided are: 1. May damages be collected by those who paid this charge during the period from its imposition in 1894, and the reduction of the through rate in 1896? 2. Is the charge of

[1] 7 I. C. C. Rep. 513, 1898. 10 I. C. C. Rep. 83, 1903. 186 U. S. 320, 1904.

two dollars unlawful when applied to shipments from the territory unaffected by the reductions of 1896? 3. In view of advances since 1896, may not the terminal charge now serve to render the entire through rate unlawful? [1]

### THE FREIGHT BUREAU CASES

*The Freight Bureau of the Cincinnati Chamber of Commerce* vs. *Cin., N. O. and Texas Pacific Ry. Co. et al.*
*The Chicago Freight Bureau* vs. *Louisville, New Albany and Chicago Ry. Co. et al.*[2]

Out of these cases grew the famous maximum rate decision, which has played such an important part in the interpretation of the Interstate Commerce Law.

Prior to January, 1892, rates into Southern territory were subject to the keenest competition between the Atlantic steamship lines, the Eastern railroads, and those of the Central West. In fact, it was not infrequently the case that raw produce from the West moved eastward through Chicago to New York, and thence into the South by rail and ocean lines. Likewise Eastern manufactured products often moved westward to Chicago, and then into the South by the railroads of the Central West.

In order to put a stop to this competition, all the railroads leading into the South entered into what was known as the Southern Railway and Steamship Association. The object of this Association may best be set forth by a few quotations from the articles of agreement.[3]

For the mutual protection of the various interests, and for the purpose of securing the greatest amount of net revenue to all the

[1] See 11 I. C. C. Rep. 277, 296. The Commission here reaffirmed its former ruling as far as it applied to territory to which the reductions of 1896 did not apply, and to territory from which the rates had been advanced since 1900. The matter is still a subject of litigation.

[2] 6 I. C. C. Rep. 195, 1894. 76 Fed. Rep. 183. 62 Fed. Rep. 609. 76 Fed. Rep. 1007. 167 U. S. 479, May, 1897.

[3] The full text of this agreement was presented to the Senate Committee by Commissioner J. C. Clements. See Hearings of the Members of the Interstate Commerce Commission before Senate Committee, pp. 85–97.

companies, parties to this agreement, it is agreed that what are termed 'western lines' shall protect the revenue derived from transportation by what are known as 'eastern lines' with rates as fixed by this Association, so far as can be done by the exaction of local rates, and that eastern lines shall in like manner protect the revenue of western lines. . . .

It is distinctly understood and agreed that the maintenance of rates as established under the rules of the Association is of the very essence of this agreement, and parties hereto pledge themselves to require all their connections to maintain such rates, and in the event of any company or line or its connections, not members of the Association, failing to conform to the obligation, the other parties in interest pledge themselves to increase their proportion of the through rates sufficiently to protect the authorized rate whenever required by the commission (meaning the executive board of the Association) to do so, provided that in no case shall any company be required to charge more than its local published rates.

In pursuance of this iniquitous and unlawful agreement, there was a careful division of the territory between the Eastern and the Western lines, which resulted in giving to the Western lines a practical monopoly of carrying raw material into the South, and to the Eastern lines a similar monopoly in the traffic in manufactured products. The result of this new adjustment of rates was that Chicago and Cincinnati and other cities of the Central West were practically excluded from trade with the South in manufactured products, in which trade they had previously participated.

After an extended hearing, the Commission ordered a readjustment of rates from Chicago and Cincinnati, which would have resulted in placing these cities more nearly upon an equal competitive basis with the Eastern cities in supplying the demand of the South for manufactured products. The following table denotes the sweeping character of the changes which were ordered:

| To | Class 1 | | Class 2 | | Class 3 | | Class 4 | | Class 5 | | Class 6 | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Old Rate | Ordered | Old Rate | Ordered | Old Rate | Ordered | Old Rate | Ordered | Old Rate | Ordered | Old Rate | Ordered |
| Knoxville, Tenn. | 76 | 53 | 65 | 45 | 57 | 37 | 47 | 27 | 40 | 22 | 30 | 20 |
| Chattanooga, " | 76 | 60 | 65 | 54 | 57 | 40 | 47 | 30 | 40 | 24 | 30 | 22 |
| Rome, Ga., | 107 | 75 | 92 | 64 | 81 | 54 | 68 | 44 | 56 | 34 | 46 | 24 |
| Atlanta, Ga. | 107 | 86 | 92 | 73 | 81 | 60 | 68 | 45 | 56 | 35 | 46 | 27 |
| Meridian, Miss. | 122 | 114 | 102 | 98 | 89 | 80 | 75 | 62 | 62 | 49 | 54 | 38 |
| Birmingham, Ala. | 89 | 87 | 79 | 74 | 68 | 60 | 55 | 46 | 47 | 36 | 36 | 28 |
| Anniston, Ala. | 107 | 86 | 92 | 73 | 81 | 60 | 68 | 45 | 56 | 35 | 46 | 27 |
| Selma, Ala. | 108 | 108 | 102 | 92 | 88 | 78 | 71 | 60 | 59 | 48 | 47 | 36 |

In addition to ordering these radical changes, the Commission sought to extend the scope of its order over a much broader field:

> And that said defendants . . . are also hereby notified to further readjust their tariffs of rates and charges so that rates from Chicago and Cincinnati to southern points other than those above herein specified, shall be in due and proper relation to rates put into effect by said defendants in compliance with the provisions of this order.

The principal criticisms upon the equity of this order are confined to the assertion of the fact that it was too sweeping in character, and to the charge that the enforcement of this order would have led to an unequal adjustment of rates between the Southern points. No one has denied the general good which might accrue to the public if the Western manufacturers could be placed upon an equal basis with those of the East in supplying the demand of the South for finished products.

With regard to the charge that the order was too sweeping in its character, it may be said that it was no more sweeping than the readjustments which were made by the railroads themselves in pursuance of the unlawful purposes of the Southern Railway and Steamship Association, which resulted in bringing about the unequal conditions

for which remedy was sought. As to the equity of the provisions of the order as applied between the various Southern points themselves, it would seem from the face of the order cited above that some of these points might have just cause to complain that they were placed at a disadvantage with respect to other points, but this fact could not be properly determined without more evidence than that which is available in the records of the case.

The Circuit Court having reversed the decision of the Commission, the matter was certified to the Supreme Court, which rendered the memorable decision declaring that Congress had not delegated rate-making power to the Interstate Commerce Commission. The following is an extract from this decision:

> It is one thing to inquire whether rates which have been charged are reasonable — that is a judicial act — but an entirely different thing to prescribe rates for the future — that is a legislative act.
>
> It will be seen in this case that the Interstate Commerce Commission assumed the right to prescribe rates which should control in the future, . . . so that if the power exists, as it is claimed, there would be no escape from the conclusion that it would be within the discretion of the Commission, of its own motion, to suggest that interstate rates upon all roads were unjust and unreasonable, notify the several roads of such opinion, direct a hearing, and upon such hearing make a general order reaching to every road, and covering every rate. . . . The power itself is so vast and comprehensive, so largely affecting the rights of carriers and shippers, as well as indirectly all commercial transactions, that no just rule of construction would tolerate such a grant of power by mere implication.

## THE ORANGE RATE CASE

*The Railroad Commission of Florida* vs. *Savannah, Florida & Western Railway Company et al.*[1]

In this case, the Commission held as follows:

> Carriers making an advance in rates should be able to make a satisfactory justification for such advance, particularly when the old rates have been of many years' standing, and the advance is great, and the traffic affected is of large and constantly increasing volume, and of vital importance to a large section of the country.

Acting upon this principle, the Commission held that the advance of ten cents per box in the rate on oranges from Florida to points in the State of New York, which was made by the defendants on November 23, 1890, was without justification, and so far as it exceeded five cents per box was unreasonable.

Here the Commission exhibited a tendency which inevitably makes its appearance in all forms of government rate-making. The principle which is here advocated, if carried out to its logical conclusion, implies that the public has a sort of vested right in the existing rates, and that if the railroads desire to raise those rates, the burden of proof is upon them to justify such advance, the *prima facie* evidence being that the advance is unlawful.

This principle of rate control, if enforced, might work incalculable damage to the development of the national resources of our country. Railroads are every day, and many times a day, extending low rates for the purpose of developing industries which could not otherwise exist. These rates, for the time being, may be unprofitable, but they are made upon the supposition that the stimulation to trade resulting from them will eventually cause sufficient increase of the traffic to render them profitable. It is impossible that railway managers should in every case

[1] 5 I. C. C. Rep. 13, 136, 1891. 167 U. S. 512, May, 1897.

be able to foresee accurately just what will be the result of these lower rates. They may frequently be mistaken. Traffic may not develop in sufficient measure to render the new rate profitable. But it sometimes takes several years to find this out. In the mean time some few industries may have been built up upon faith in the continuance of this low rate. If, however, the increase in the traffic should not have been sufficient to make the business as profitable to the railroad as that which was obtained under the former rate, there is no other course for the railroads but to restore the old rate. Railroad managers, to be sure, are not philanthropists; their object is to secure the greatest net revenue possible, and that some individuals may be crushed under the wheels of economic development is of little concern to them.

In such a case as that just cited, a bitter cry always arises from those marginal producers who have come in on the faith in the continuance of the existing rates. They complain that the arbitrary action of the railroad in raising rates has rendered them no longer able to stay in business and meet their expenses of production. The railroads are represented as devouring monsters, deliberately crushing industry for their own personal ends. Few government administrative bodies are able to remain entirely free from the influence of such arguments as these.

But what would inevitably be the result, if this principle were enforced? Railroad managers would fear to make voluntary reductions, lest, if the lower rate should prove unprofitable, they would be unable to secure the prompt restoration of the former rate. They would prefer to make their calculations upon the known results of existing rates, rather than to experiment with new rates which might be forced upon them in perpetuity, even though they might prove much less profitable than the old rates. This is the exact situation in which the railroads of Great Britain find

themselves to-day, the difficulty of securing an advance practically inhibiting all important reductions.[1]

Upon the merits of this particular case, however, both the Circuit Court and the Circuit Court of Appeals sustained the order of the Commission. The case came to the Supreme Court soon after the maximum rate decision, and the Court merely reaffirmed the doctrine of that case, to the effect that the Commission had exceeded its powers in attempting to set a maximum rate for the future.

### THE TRUCK FARMERS' CASE

*The Truck Farmers' Association of Charleston and Vicinity* vs. *Northeastern Railroad Company et al.*[2]

This case is interesting, since it is the first attempt by the Commission to hold the railroads responsible for unreasonable icing charges of private refrigerator lines. Upon this point the Commission ruled as follows:

> Where a carrier pays mileage for a car which it employs in the service of shippers, it is the carrier, and not the party or company from whom the car is rented, who furnishes the car to the shipper, and in such case there is no privity of contract between the car owner and the shipper.
>
> It is the duty of the carrier to furnish an adequate and suitable equipment for all the business which it undertakes, and also whatever is essential to the safety and preservation of the traffic in transit.
>
> When carriers undertake the transportation of perishable traffic, requiring refrigeration in transit, ice and facilities for its transportation in connection with that traffic are incidental to the service of transportation, and the charge therefor is a charge *in connection with* such service, within the meaning of section one of the act to regulate commerce, in respect to the reasonableness of which the carrier is subject to the statute.

Unfortunately, this particular ruling has been neither

[1] *Vide ante*, pp. 81 ff.

[2] 6 I. C. C. Rep. 295, 1895. 74 Fed. Rep. 70, 1896. 83 Fed. Rep. 611, 1897.

reversed nor sustained by the courts, as this case was decided upon other grounds. It is certain that if this point, for which the Commission is still contending, should be sustained by the courts, many of the abuses of the private car lines, which have recently become so flagrant, would be subject to correction by the public, without further legislation than that there should be established a more adequate system of government control over rates.[1]

In this particular case, the Commission assumed that the long enforcement of a given set of rates on fruits and vegetables from the South was *prima facie* evidence of the reasonableness of those rates. As the railroads failed to give adequate reasons for a considerable advance in rates which had been made, the Commission held that the rates on strawberries from Charleston to Jersey City should not exceed six cents per quart, including the charges for refrigeration, and that the refrigeration charges themselves should not exceed $1\frac{1}{2}$ cents per quart.

The Circuit Court and the Circuit Court of Appeals reversed this decision on the grounds that the Commission was exceeding its powers in attempting to establish a maximum rate for the future.

No opinion was expressed as to the reasonableness of the rates proposed by the Commission, or as to the propriety of including the icing charges as a part of the transportation for which the railroads are responsible.[2]

The following are a few miscellaneous cases which we add for the sake of completing the list of court decisions up to 1905.

[1] See pp. 47 ff.

[2] It will be noted that this case was begun by the Commission previous to the maximum rate decision, and that its final determination by the courts was subsequent to that decision.

### THE KENTUCKY AND INDIANA BRIDGE CASE

*The Kentucky and Indiana Bridge Company* vs. *Louisville and Nashville Railroad Company.*[1]

This case is important in that it is the first instance of a refusal on the part of a railroad to obey the order of the Commission, and of the appeal by the Commission to the courts for the enforcement of its order. As the case has but little bearing upon the subject of the regulation of railway rates, but concerns only the relations of the carriers among themselves, it is properly omitted in this discussion.

### THE PARTY RATES CASE

*Pittsburg, Cincinnati and St. Louis Railway Company* vs. *Baltimore and Ohio Railroad Company.*[2]

In this case the Commission held that the granting of party rates was illegal, in that it amounted to an unjust discrimination in favor of the wholesale purchaser of transportation. Both the Circuit Court and the Supreme Court refused to sustain this view. They held that there could be no unjust discrimination as long as the same reductions in rates were offered to all parties of the same number and general character. In the opinion of the court, such rates tended to promote rather than to hinder travel, and the suppression of the practice of giving them would result in great hardship. Theatre companies, pleasure parties, delegates to conventions, etc., would suffer great damage if such rates were withdrawn.

### THE HEARD CASE

*William H. Heard* vs. *Georgia Railroad Company.*[3]

This case does not involve the question of rate regulation, as it is only a ruling against the Georgia Rail-

[1] 2 I. C. C. Rep. 162, 1888. 37 Fed. Rep. 561, 1889.
[2] 3 I. C. C. Rep. 465, 1890. 43 Fed. Rep. 37, 1890. 145 U. S. 263, May, 1892.
[3] 1 I. C. C. Rep. 3938, 188. 3 I. C. C. Rep. 111, 1890.

road for unlawfully discriminating against colored passengers. The case was finally withdrawn from the courts, owing to the substantial compliance of the railroad.

### THE ORANGE ROUTING CASE

*The Consolidated Forwarding Company* vs. *Southern Pacific Railway et al.*[1]

Prior to January 1, 1900, shippers of citrus fruits from Southern California were given the privilege of choosing the routes over which their shipments should pass in reaching their eastern destination. At that time, however, an order was issued reserving to the initial carrier this right of routing.

The Commission, after allowing a hearing to both parties concerned, rendered an opinion which strongly condemned the action which the railroads had taken. It was held that such a practice, in the very nature of things, resulted in discrimination between the various shippers. The facilities of one route might be open to one shipper, and closed to another, or they might be open one moment and closed the next to the same shipper, without previous notification. Under this system of routing, it was held that equal treatment of shippers was impossible, and it was shown that some shippers were still accorded the privilege of a choice of routes, while others were refused the same privilege. The practice was also condemned in that it amounted to an illegal pooling of traffic, within the meaning of section five of the Interstate Commerce Act.

Chairman Knapp uttered a strong dissenting opinion to the effect that as interstate carriers are not required by law to join with connecting carriers in the promulgation of through rates,[2] whenever they chose to do so voluntarily, they could impose any conditions they saw fit, providing

[1] 9 I. C. C. Rep. 182, March, 1902. 132 Fed. Rep. 829, Sept. 1904.

[2] Under the Act of June 29, 1906, carriers may be required by the Commission to promulgate joint rates.

equal treatment were accorded to all. This reservation of the right of routing to the initial carrier was not in itself a refusal to accord equal treatment, nor was it evidence of an illegal pool. The reservation had been made for the express purpose of stopping the unequal treatment of shippers. During four years previous to 1900, rebates amounting to $175,000 had been paid by Eastern carriers to a single California firm. It was to prevent these illegal rebates that the privilege of routing was taken away from the shipper.

The Circuit Court sustained the order of the Commission on the ground that the defendant carriers were engaged in pooling in contravention of the fifth section of the Interstate Commerce Act. A pool is constituted whenever the contract or agreement provides any special means or agency for apportioning the freights, which destroys the rivalry which would otherwise exist between the railroads; and a contract by which the apportionment is left absolutely to the will of the initial carrier, accomplishes this end as effectually as though definite percentages were fixed in the contract. An appeal is now pending.[1]

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## SUPPLEMENTARY NOTE TO CHAPTER V

The following cases have been decided since the above was written.

### THE TIFT LUMBER CASE

*H. H. Tift et al.* vs. *Southern Railway et al.*[2]

It appeared that upon Sept. 8, 1899, important advances were made in the rates on lumber from points in Georgia to the Ohio River, amounting to from one to four cents per 100 lbs. This remained a permanent advance over the rates which had been in force since 1892. On April 15th, 1903, another advance of two

[1] This decision was reversed by the Supreme Court, February 6, 1906. It was held that such an arrangement did not constitute illegal pooling of traffic, and that where such a practice resulted from a *bona fide* effort to put a stop to the giving of rebates, it was not only lawful, but very much to the advantage of the public. (200 U. S. 536.)

[2] 10 I. C. C. Rep. 548. 138 Fed. Rep. 753. The case is now pending in the Circuit Court of Appeals.

cents per 100 lbs. was promulgated. The latter advance, however, was prevented from taking effect by a temporary injunction which was issued by the United States Circuit Court for the southern district of Georgia.

After an examination of the facts, the Commission held that the proposed advance was unreasonable. The carriers were not justified in advancing the rates upon lumber simply because it was made to appear that they were in need of additional revenue. The character of the commodity transported, the effect of the advance upon the business interests involved other than those of the carriers were also factors which should be considered in the determination of the question as to what constitutes a reasonable rate. Upon a consideration of all the facts it was held, therefore, that the existing rate was sufficiently remunerative to the carriers, and any further advance was without justification.

The Circuit Court sustained the order of the Commission upon all points. The *prima facie* character of the findings of the Commission was strongly urged. Furthermore, the proposed advance was shown to be unreasonable in that it would practically destroy the traffic to which it applied. Referring to the Southeastern Freight Association, the court held that the concerted action which had been taken by that organization in advancing the rates in question was clearly a violation of the law, and that in so doing the defendants were engaged in illegal pooling.

The case is now pending in the Circuit Court of Appeals.

### THE YELLOW PINE CASE

*The Central Yellow Pine Association* vs. *The Illinois Central Railway.*[1]

In this case the facts were very much the same as in the Tift Case, to which reference has just been made, except that the advances in the lumber rate applied to different territory.

Upon April 1st, 1903, the Illinois Central advanced the rates on lumber from points in Louisiana east of the Mississippi, and from points in Mississippi and a portion of Alabama to the Ohio River, two cents per 100 lbs. The Central Yellow Pine Association complained that the advanced rate was unreasonable *per se*, and resulted in unjust discrimination against the lumber traffic, as compared with other traffic of like character. The Commission rendered a decision for the complainants, which was sustained by the Circuit Court.

[1] 10 I. C. C. Rep. 489.

### THE ABERDEEN GROUP CASE

*The Aberdeen Group Commercial Association* vs. *The Mobile and Ohio Railroad Company.*[1]

In this case, the Commission held that the rates on grain from St. Louis to certain points in Mississippi were unreasonable, and the carrier was accordingly ordered to cease and desist from charging the same. The railroad at first refused to comply, but upon appeal to the Circuit Court for the enforcement of the order, the Commission was sustained. No appeal was taken from the latter decision.

### THE HOPE COTTON OIL CASE

*The Hope Cotton Oil Company* vs. *Texas Pacific et al.*[2]

The complainant in this case alleged that the defendant railway company had promulgated through rates from points in Louisiana and Texas to Hope, Arkansas, which were higher than the sum of the local rates by way of Texarkana.

It was admitted that under the law as it then stood there was nothing which would require a railroad to charge no more than the sum of its local rates upon a through shipment. But it was contended that the right to ship upon two separate bills of lading upon the separately published local rates of the defendant carrier could not be lawfully denied by it. It appeared that the railroad had refused to accept complainant's shipments to Texarkana, and to allow the reconsignment of the same to Hope, Arkansas, at the published local rates.

The Commission sustained the contention of the complainants, and issued an order which required the railroad to accept such local shipments. The Circuit Court, however, overruled the Commission upon this point, and held that under the Elkins Law as it then stood, the carriers were required to collect the whole of their published through charges upon such shipments.

The Commission refused to prosecute the case further in the courts, but since the passage of the new rate law in June, 1906, the Hope Cotton Oil Company has commenced suit for the establishment of a reasonable through rate, which shall not exceed the sum of the local rates between the points in question.

[1] 10 I. C. C. Rep. 505.
[2] 10 I. C. C. Rep. 696.

### THE ST. LOUIS HAY CASE

*The St. Louis Hay and Grain Company* vs. *Southern Railway.*[1]

It appeared that the Southern Railway charged two cents per 100 lbs. more for hay which was unloaded and reconsigned in St. Louis, than upon hay which was not so reconsigned. The St. Louis Hay and Grain Company appealed to the Commission on the grounds that this practice resulted in undue prejudice to their business, and asked that the rates should be made the same upon hay which was reconsigned in St. Louis as upon hay on through bills of lading.

The Commission sustained the contention in part and held that the rates upon reconsigned hay should not be more than one cent per 100 lbs. higher than those upon hay not so reconsigned. Reparation to the extent of one cent per 100 lbs. was accordingly ordered upon all shipments which had been made by the complainant. The Circuit Court of the western district of Illinois sustained the Commission upon this point. An appeal, however, was taken from this decision.

### THE SOAP CASE

*Proctor and Gamble Company* vs. *Cincinnati, Hamilton and Dayton Railway Company.*[2]

The evidence in this case showed that for thirteen years the rates upon laundry soap in less than car-load lots had been the same as that which had been applied to fourth class freight generally, while the rates upon such soap in car-load quantities had varied between the regular rates for fifth and sixth classes.

Upon January 1st, 1900, when the official classification schedule went into force, the rates upon laundry soap in car-load lots were advanced to sixth class, while those upon less than car-load lots were advanced to equal those which applied generally to third class freight. Pending suit before the Commission, the rates upon less than car-load lots were reduced to 20 per cent less than third class, with the provision that they should never be less than fourth class.

After a consideration of the facts, the Commission dismissed the complaint as far as it applied to car-load quantities, but sustained it as far as applied to less than car-load lots. It was held that the advanced rate would result in undue prejudice against

[1] 11 I. C. C. Rep. 90. [2] 146 Fed. Rep. 539.

the complainant, and the fact that fourth class rates had been applied to such traffic for thirteen years was in itself *prima facie* evidence that the rate in question was sufficiently remunerative. Accordingly the defendant carriers were ordered to continue to apply fourth class rates to laundry soap in less than car-load lots. In November, 1905, this decision was sustained by the Circuit Court.

### DRESSED BEEF CASE

*The Chicago Live-Stock Exchange* vs. *Chicago & Great Western Railway Company et al.*[1]

For some time it had been the practice of the trunk lines leading from Missouri River points to Chicago to charge the same rates upon packing-house products as upon live stock. This resulted in placing the packing establishments upon the Missouri River upon an equal footing with those of Chicago in supplying the markets of the Eastern States and those of the intervening territory.

In order to secure a remunerative contract from the Missouri River packers, and thus considerably to increase its share of the business, the Chicago & Great Western broke away from the agreement which had hitherto prevailed among the Western trunk lines, and put into force a much lower rate upon packing-house products. The members of the Chicago Live-Stock Exchange felt that this was an unjust discrimination against them, and accordingly brought suit against the Chicago & Great Western in order to compel it to remove this discrimination in favor of packing-house products.

The Commission held that while the Great Western was at liberty to make any reductions it saw fit upon dressed beef or other commodities, it was not justified in so adjusting its rates as to result in undue prejudice to competing industries. In order to avoid such discrimination in favor of the packing industry of one section as against that of another, it was substantially held that the Great Western and the other roads which had participated in this reduction upon packing-house products should either withdraw such concessions or make similar reductions in the rates upon live-stock. This the roads in question

[1] 10 I. C. C. Rep. 428. 141 Fed. Rep. 1003.

refused to do, and the Commission appealed to the Courts for the enforcement of its order.

The Circuit Court for reasons stated elsewhere,[1] refused to enforce this order, and appeal is now pending in the Supreme Court of the United States.

[1] *Vide* p. 30.

## CHAPTER VI

### A RATIONAL PLAN FOR PUBLIC CONTROL OF RATES

In a preceding chapter, we have endeavored to show that a certain amount of public control of rates is necessary. Upon this point nearly all authorities agree. Circumstances frequently arise where some sort of rate control by the public would not only be advantageous to the public at large, but to the railroads themselves. In fact, even the most ardent of the railway advocates do not object so much to a system of public control in itself as to an irrational and rigid system of public control.

Nor has the right of the public to control rates been seriously questioned. Common carriers, from time immemorial, have been subject to peculiar obligations toward the public. They have always been held to be legally bound to render their services to all applicants upon equal terms, while, at the same time, the charges for those services should not exceed a reasonable figure. Furthermore, railroads have placed themselves under peculiar obligations to the public through their exercise of the right of eminent domain, a power which belongs to no individual or private corporation, unless it has first been conferred by the state.

According to the principles upon which our state and national governments are founded, private property cannot be taken by the state, or by a corporation or individual exercising the power of eminent domain conferred by the state, except for public purposes, and with due process of law. Private property cannot be taken for private purposes without the owner's consent, no matter what compensation may be allowed. Therefore it is not only the legal right,

but the duty of the state to see to it, that wherever it has authorized the taking of property, that property should continue to be used not solely for private but for public purposes.

It is extremely doubtful whether this end may in every case be fully attained where the final determination of railroad rates is left exclusively to the discretion of private individuals whose interests are none other than to secure the largest return possible from railway operations. Wherever extortion and unjust discriminations are practiced, it is certain that this end is not attained. No public purpose is pursued where the industries of one section of the country are destroyed for the purpose of the protection of similar industries in another section ill adapted to their development, and where the only object of such a measure is to secure some private advantage for the railroads concerned.[1] However this may be, it is certain that the state may exact compensation for the valuable privileges which it confers upon railroads, and this compensation may take the form of a mandate that their rates and charges should be subject to reasonable control.

Another ground upon which the right of the public to control rates is based is the necessity of the service. It is not every necessary service that needs to be subjected to public control. Wherever the service is such that any person with a reasonable amount of capital may engage in business under conditions of free competition, we may safely trust to economic forces to protect the public from extortion. But this is not the case in the railroad industry. It is the monopolistic feature that renders public control essential. The right and the duty of the public to exercise a reasonable control over the agents of transportation is, therefore, so generally admitted that it is no longer an open question.

The main problem, however, is the determination of

[1] See Kansas corn-meal case, *ante*, p. 34.

what constitutes a reasonable rate. Some have contended that, as long as railway rates are below the cost of transportation by other means than railways, the public has no right to complain. In fact, some railroad advocates have arrogantly assumed that the railroads have been the sole causes of the development of the resources of this country, and that the public ought to be glad to obtain any rate lower than cost of transportation without railroads. This contention, however, cannot be sustained. The railroads have not brought about the development of this country entirely unaided. In fact, the railroads themselves could have accomplished nothing whatever unless there had been capital, labor, and men of affairs ready to enter and develop the new territory which was made accessible by the railroads. Surely these factors have figured as strongly in the development of this country as the railroads themselves.

Nor is it the present stockholders of a railroad that have enabled it to exist. The countless inventions and improvements which have taken place within the past century are the result of the labor and study of thousands of individuals, many of whom never owned a single share of railway stock. The Government has partially recompensed these public benefactors by granting to them temporary monopolies in the production of the articles which they have invented. After the expiration of the brief period for which the limited monopoly has been conferred, the new process becomes public property. The only point of contribution which the railway managers have made with respect to these great improvements has been the readiness with which they have adopted them when they saw it was to their interests to do so. For this they are justly entitled to a portion of the advantages accruing from them.

But the public, which has encouraged the invention and made it possible by granting to the inventor a legal monopoly in the production of the article, is entitled to a

far greater portion of these advantages. It is evident, therefore, that the railroads, embodying as they do the accumulated results of the enlightened thought of the past, and enjoying the common advantages resulting from the growth of civilization and of the division of labor, cannot lay claim to all the advantages which their existence renders to society. Wherever, therefore, the railroads are unchecked by competition, or by other economic causes, public control is absolutely necessary to prevent them from demanding rates which will enable them to absorb the whole of the value of their existence to the community which they serve, for this they will surely do unless held in check by such regulation or by the fear of it. Fortunately, economic causes have thus far proved a most efficient regulator in all but a very few cases.

On the other hand, we have shown the dangers and difficulties which would be encountered in connection with any rigid system of rate control by a commission. We must, therefore, seek for some other plan by which the interests of the public may be protected, and at the same time the evils in connection with any rigid system of rate control, such as is embodied in arbitrary rate-fixing by a commission, may be avoided as far as possible. Let us, therefore, first examine the plan which has been in force since the passage of the Interstate Commerce Law of 1887 and see whether it has proved itself adequate to meet the exigencies of the situation.

In the first place it is quite evident that something must be wrong with a plan which has produced such general dissatisfaction. It is extremely doubtful whether the present widespread agitation for a better system of rate control could have come into existence unless there were serious evils in respect to which shippers have found themselves unable to obtain an adequate remedy under the present law.

Nevertheless, this system of rate control has accom-

plished a great deal of good, and it is certainly preferable to a plan by which all the railroads of the country would be subjected to a rigid system of commission-made rates constructed strictly upon the mileage basis, such as the system which prevails within the State of Texas to-day.

Up to January 1, 1906, the Commission had received 3791 informal complaints. Of these some 2400 have been disposed of informally to the satisfaction of both the shippers and the railroads. The remainder of these cases have been dropped, either because the Commission did not consider the grievance sufficient to warrant a formal complaint, or from neglect on part of the complainant to pursue his case further. With respect to these informal complaints alone the Commission has more than justified its existence. It has accomplished much by the exercise of its good offices in securing amicable settlements between the shippers and the railroads.

Up to January 1, 1905, the total number of formal complaints submitted to the Commission was 789. Of these 359 had been withdrawn owing to private settlement to the satisfaction of the complainant or for some other cause. Formal decisions were rendered in 369 cases, while sixty-one were still pending at that date.[1] In 185 of the cases in which formal decisions were rendered, the action taken by the Commission was in some degree favorable to the complainant. In practically every case where the Commission declared a given rate unlawful, it recommended the extent of the change which it considered necessary to enable the railroad to comply with the law. In forty-four cases in which such recommendations were made, the railroads refused to obey the order, and the Commission applied to the courts for its enforcement. The following table indicates briefly the disposal which was made of these various cases. In twenty-eight cases the

[1] During the year 1905 the Commission conducted sixty-five investigations, and rendered forty-five decisions.

courts have refused to enforce the order of the Commission, fourteen of these being decided by the Supreme Court on final appeal and fourteen by the lower courts without appeal. They are as follows:

| *Name of Case.* | *Reference.* |
|---|---|
| 1. Kentucky Bridge Case | 37 Fed. Rep. 567. |
| 2. Party Rates | 145 U. S. 263. |
| 3. San Bernardino | 50 Fed. Rep. 295. |
| 4. Coxe Coal | 74 Fed. Rep. 784. |
| 5. Cartage | 167 U. S. 633. |
| 6. Orange Rates | 167 U. S. 512. |
| 7. Import Rates | 162 U. S. 197. |
| 8. Delaware Grange | Not reported. |
| 9. Nashville Coal | 73 Fed. Rep. 409. |
| 10. Chattanooga | 131 U. S. 1. |
| 11. Georgia Commission | 181 U. S. 29. |
| 12. Georgia Commission | 181 U. S. 29. |
| 13. Georgia Commission | 181 U. S. 29. |
| 14. Alabama Midland | 168 U. S. 144. |
| 15. Window Shades | 64 Fed. Rep. 723. |
| 16. Freight Bureau | 167 U. S. 479. |
| 17. Maximum Rates | 167 U. S. 479. |
| 18. Hay Rate | 175 U. S. 648. |
| 19. Truck Farmers | 83 Fed. Rep. 611. |
| 20. Piedmont | 105 Fed. Rep. 703. |
| 21. Piedmont | 105 Fed. Rep. 703. |
| 22. Lagrange | 190 U. S. 273. |
| 23. Griffin | 84 Fed. Rep. 258. |
| 24. Spokane | 83 Fed. Rep. 249. |
| 25. Cattle Raisers | 186 U. S. 320. |
| 26. Wilmington | 124 Fed. Rep. 624. |
| 27. Hay Classification | 202 U. S. 613. |
| 28. Kearney | |

In three cases the order of the Commission has been overruled but appeal is now pending.

| *Name of Case.* | *Reference.* |
|---|---|
| 1. Danville | 122 Fed. Rep. 800. |
| 2. Hampton | 120 Fed. Rep. 934. |
| 3. Dressed Beef | Not yet reported. |

In two cases the order of the Commission has been enforced by a formal decision of the courts.

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| 1. Charleston Naval Stores | 118 Fed. Rep. 613. |
| 2. Social Circle (sustained in part only) | 162 U. S. 184. |

In two cases the court issued a temporary order enforcing partial compliance, but no formal decision was rendered.

| | |
|---|---|
| 1. Tileston Milling Co. | 8 I. C. C. Rep. 346. |
| 2. City of St. Cloud | 8 I. C. C. Rep. 346. |

In two cases the order of the Commission has been sustained but appeal is now pending.

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|---|---|
| 1. Orange Routing | 132 Fed. Rep. 829. |
| 2. Chesapeake and Ohio | 128 Fed. Rep. 59. |

Four cases have been withdrawn.

| | |
|---|---|
| 1. Heard | 3 I. C. C. Rep. 111. |
| 2. Georgia Commission | 5 I. C. C. Rep. 324. |
| 3. Georgia Commission | 5 I. C. C. Rep. 324. |
| 4. Minneapolis Grain | 5 I. C. C. Rep. 571. |

Two cases are still pending in the court of first instance, and one was dismissed, owing to private agreement between the parties.[1]

[1] Since the above was written, it appears that the courts have been taking quite a different attitude toward the work of the Commission. During the past twelve months more orders of the Commission have been enforced by the courts than during the whole of the eighteen years previous. It is barely possible that the agitation for a more efficient system of public regulation of rates has led to this apparent change in the trend of legal decisions. Among the important cases which have been affirmed by the courts are:

| | |
|---|---|
| The Tift Case | 138 Fed. Rep. 753. |
| The Yellow Pine Case | 10 I. C. C. Rep. 489. |
| The Aberdeen Group Case | 10 I. C. C. Rep. 505. |
| Hope Cotton Oil Case | 10 I. C. C. Rep. 696. |
| St. Louis Hay Case | 11 I. C. C. Rep. 90. |
| The Soap Case | 146 Fed. Rep., 539. |

The Orange Routing Case, which had been previously sustained by the Circuit Court, has recently been overruled by the Supreme Court.

Of the cases overruled, fifteen were on the ground that the Commission had wrongly interpreted the long and short haul clause; four, on the ground that the Commission had not the power to fix a rate to apply for the future; five, on the ground that the facts failed to reveal that the discriminations complained of were unjust; and four on various other grounds.

Of the remaining 141 cases in which the Commission has taken action favorable to the complainants, the roads made substantial compliance in all but six, and in all but two of these six cases the reductions made were considerable.[1]

Thus we see that the Commission has been by no means powerless to effect a remedy in cases where the complainant has justifiable grounds for demanding one. In more than ninety-five per cent of the cases in which the Commission was unable to enforce its order, the courts have declared that order to be unlawful, and therefore one which ought not to have been enforced. In view of this fact, there appears to be no reason why those with real grievances against the railroads should not have reasonable grounds to expect relief under the present system. In fact, relief has been comparatively prompt, except in those instances where it has been necessary to appeal to the courts for the enforcement of the order, in which cases the average amount of time from the filing of the complaint till its final disposal has been considerably more than four years.

And yet in spite of this cumbersome machinery, shippers have not been entirely discouraged from making complaints before the Commission. During the past year (1905), the number of complaints filed was 568, a number considerably greater than that of any previous year, and equal to nearly one sixth of the entire number of complaints during the eighteen years previous. It is not at all

[1] See Brief submitted to the House Committee on Interstate Commerce by Mr. E. P. Bacon.

probable that the number of complaints would thus be rapidly increasing if the shippers did not feel a reasonable hope of relief. But as has just been intimated, the main difficulty of the present system is its cumbersome machinery and, as certain railway advocates strongly assert, the *personnel* of the present Commission.

Let us for a moment examine the grounds for the many attacks which have been made upon the present Commission. In the first place, the fact that the Commission has been overruled in ninety per cent of the cases which it has carried to the courts is considered *prima facie* evidence against it. But it is by no means conclusive. By examining the records we find that the grounds upon which these cases have been overruled were either a wrong interpretation of law by the Commission or a wrong finding of facts. The former class of cases, which is by far the more numerous, may be subdivided into three groups: (1) cases where the Commission has ruled that railroad and market competition do not *per se* establish dissimilar circumstances within the meaning of the fourth section of the act; (2) cases where the Commission has held that relief from the application of the provisions of the fourth section of the act, whenever the competition of carriers subject to the act has been alleged as ground for that relief, may be secured only through a direct application to the Commission for relief in the form which is prescribed by the act itself; (3) cases in which the Commission has assumed the power to fix rates.

Upon these various points, it appears that the Commission was nearer a literal interpretation of the law than the courts, while the decisions of the courts, on the other hand, have been more in accordance with the spirit of our institutions. Nor is it surprising that a Commission appointed for the express purpose of enforcing a given law, should be inclined to adopt a literal interpretation of that law.

In the first place, the courts have held that market and railroad competition constitute dissimilar circumstances within the meaning of the fourth section of the act, while the Commission has held that such competition so operates only in exceptional cases. If the law is to be interpreted literally, as its framers evidently intended that it should be, it appears that the contention of the courts as to the meaning of the section can hardly be sustained. In fact those circumstances which the courts hold sufficient to justify a departure from the observance of the provisions of the long and short haul clause, are the only ones which could operate to cause a railroad to make such departure in the first instance, even though it might be entirely free from legal obligations in the matter. Self-interest would of itself prevent the railroad from charging less for the greater distance, unless the traffic at the more distant point were subject to market, rail, or water competition, such as did not prevail at the intermediate point.

Evidently it was the intention of the framers of the act to extend, as far as possible, some of the benefits arising from competition at the great distributing centres, to intermediate points where such competition did not operate. If the roads are allowed perfect freedom to refuse to observe the long and short haul provision wherever competition exists at the more distant point, it is evident that the law will fail to accomplish its purpose.

When the Interstate Commerce Act was first passed, the railroads all over the country remodeled their schedules so as to conform to the long and short haul provision, and there was a general and widespread reduction in local rates. At present, however, under the rulings which have been made by the courts, the railroads observe the provision or not, practically at their own discretion, and the law has been rendered scarcely more than a dead letter. The result has been that there has been almost no decline in local rates since 1887. I do not assert the long and short haul

clause is a wise provision of the law, or that as a matter of economic policy it ought to be enforced in many cases. The point which I wish to make is, that the Commission has adopted a reasonable interpretation of the law and the only one which leaves any substance whatever to it.

A second point involving the interpretation of this section concerns the method of procedure by which relief from its operation may be obtained. Railroads are prohibited from charging less for the greater distance over the same line in the same direction and under substantially similar circumstances. The Commission is authorized to receive applications for relief from the application of the provisions of this section, and to grant such relief in specific cases after full investigation. It is not to be supposed that Congress intended to authorize the Commission to relieve the railroads from the operation of this section in cases where the circumstances were substantially similar. That would have been to authorize the very thing which the act was intended to forbid. From the wording of the clause which sets forth the proceedings by which a railroad may obtain relief from the operation of the section, it is, therefore, at once obvious that Congress desired to leave to the Commission the power of determining the extent of the dissimilarity which would warrant the issue of the order of relief, and that the railroads should be permitted to charge no less for the greater distance unless authorized to do so.

Naturally enough the Commission here again interpreted the statute so as to leave its own powers as broad as the framers of the law evidently intended they should be. Accordingly, it gave general consent whereby railroads upon their own initiative would be permitted to charge less for the greater distance, wherever the dissimilarity of circumstances and conditions arose from water competition or from the competition of railways not subject to the act; while in other cases, departures from the observance

of the provision could only be justified after relief had been granted in the form prescribed by law.

As a matter of fact, the Commission has been very liberal in its disposal of such applications, when made by the railroads, and there is not a single case on record where the Commission refused to grant relief when applied for in the proper form.

The courts, on the other hand, have declared that the railroads are justified in charging less for the greater distance in all cases where the conditions are dissimilar, without formal application to the Commission. In other words, they have nullified that provision of the law which provides that the Commission shall determine under what circumstances relief from the operation of the fourth section of the act may be granted. Probably, in respect to this particular point, the courts were right from a legal point of view. The clause authorizing proceedings for relief may be inconsistent with that which makes it unlawful for the railroad to charge less for the greater distance only under substantially similar conditions. It would seem, however, that the phrase "under substantially similar conditions" was inserted only for the purpose of giving the Commission a criterion for its determination of the conditions upon which such relief should be granted after application by the railroad in the prescribed form. At any rate it is certain that upon this point also, the Commission adopted a reasonable interpretation of the law, and the only one which would leave any semblance of force to the provision of the statute which authorizes special proceedings for relief. Under the interpretation which the courts have adopted, that clause is a nullity. No railroad would go to the trouble of instituting proceedings for the purpose of securing the privilege of doing that which it is at liberty to do without such proceedings.

The other important point of law upon which the Commission and the courts have differed has been the question

whether the act of 1887 conferred rate-making power upon the Commission. In fact, it has been alleged that the Commission exercised that power during the first ten years of its existence, practically unquestioned as to the legality of such exercise. This point, however, is extremely doubtful.

As the Supreme Court pointed out in the maximum rate decision,[1] rate-making is a legislative power, and could not be delegated except in express terms. Nowhere in the act do we find a specific clause conferring that power upon the Commission. Neither did the courts recognize in a single case that such power had been conferred by the act. If the Commission had possessed the legislative power of making rates, its orders would have been subject to judicial review only in case of the violation of some of the constitutional rights of the carriers or other interested parties. But we do not find a single instance of this character. On the other hand, the courts assumed from the first the right to review not only the rate which the Commission had declared to be the maximum which the railways might lawfully charge, but also the decision of the Commission with respect to the question of the legality of the existing rate.

What then was the power which the Commission exercised during the first ten years of its existence, and the continued exercise of which was declared unlawful in the maximum rate decision? It was nothing more than that power which is expressly conferred by the statute, *i. e.*, the power to order the carrier to cease charging an unlawful rate, and to enforce its order by appropriate proceedings in the courts. Therefore the findings of the Commission could have been no more than findings of fact, determining the extent of the violation of the law. Since these findings are of a judicial character and the Commission was not a duly constituted court, its findings

[1] See *ante*, pp. 140 ff.

could have no legal force whatever, and the courts had the right to review its decisions and to determine whether the law had been violated independent of the action which the Commission had taken in the matter. In all this the Commission exercised no legislative function whatever. In fact, there is not a single case where the Commission has assumed that which it considered to be discretionary power in making rates. Its findings were purely of a judicial and not of a legislative character. When a given rate was complained of, the Commission merely inquired into the extent of the violation of the law. But inasmuch as it had no power to enforce these findings, they were of no legal value whatever. The result was that when certain cases came before the courts for the enforcement of the order, the courts naturally confused the findings of fact determining the extent of the violation of the law with the exercise of the discretionary power of rate-making, which the Commission never assumed. It may have been true that the findings of the Commission as to the extent of the violation of the law were wrong, the rate complained of may already have been reasonable, and the enforcement of the order of the Commission would then have amounted to an exercise of discretionary power; but there is absolutely no evidence to show that the Commission in a single instance misconstrued the powers which it evidently possessed, namely, of investigating a rate complained of, of issuing an order the compliance with which it considered necessary to enable the carrier to comply with the existing law, and of enforcing its order in the courts.

Finally, four of the cases which the Commission carried to the courts were overruled on the ground that the Commission had erred in its findings of fact. Such reversals have chiefly resulted from a refusal on the part of the railroads to fully present their case before the Commission, since its order at all events could have no binding effect.

Consequently a number of cases before the Commission have gone against the railroads practically by default, while the evidence withheld from the Commission was produced in the courts. As we have already pointed out, this was one of the methods which the railroads have used to discredit the work of the Commission.

Finally, it must be remembered that the railroads have refused to obey the order of the Commission only in those cases where it appeared that they had every prospect of success upon appeal to the courts.

We come to the conclusion, therefore, that the fact that the Commission has been overruled in twenty-eight of the 185 orders which it has issued to the carriers with respect to a change in their published rates, is not sufficient ground for the disparagement of the *personnel* of that body. With regard to the three points of law upon which the Commission and the courts have been at variance, the Commission has, in each case, assumed the reasonable interpretation which would give to the Interstate Commerce Law the broad application which its framers evidently intended that it should have, while the courts, on the other hand, have narrowed and moulded its application till its interpretation is more in accordance with the genius of our institutions, which is to give the largest possible range to private initiative which is consistent with equal rights and justice to all, by which policy it is believed that in the long run, the greatest good will be secured for the greatest number.

The principal objection, therefore, to the *personnel* of the present Commission, and one which should deter us from enlarging its powers, is that its members are naturally loath to change their points of view. Upon those points in respect to which they have so frequently been overruled by the courts, they still exhibit a leaning toward their former rulings and interpretations of the law. It is impossible that it should be otherwise, since men are al-

ways reluctant to abandon a point of view upon which they have once staked their reputation. It would seem, therefore, that the present law could be better enforced by conferring that duty upon a new tribunal, which would be less apt to be biased by previous erroneous interpretations of that law.

The other grounds upon which the attacks upon the *personnel* of the present Commission are based are: first, that it has failed properly to enforce the present law, and secondly, that it has stood for a rigid system of mileage rates, with the object of giving to every locality the advantages which should accrue to it by virtue of its geographical position. Neither of these charges is well founded. The present Commission is composed of men of undoubted integrity, and of great individual acumen. They have been battling with some of the greatest problems which have ever confronted any similar body of men. The subject-matter with which they are dealing is of comparatively recent origin. Their decisions cannot be based upon a long line of judicial opinions, extending back to the early days of Roman Law. It is not at all surprising, therefore, that they have made mistakes. That those individuals whose limited field of investigation has been entirely confined to those cases where the decisions of the Commission have appeared the weakest, the purpose of whose investigations has been to find fault with the work of the Commission, should find abundant material for their purpose, is by no means remarkable.

In regard to the charge that the Commission has failed properly to enforce the present law, it is evident that the same charge may be made against practically every executive and administrative officer throughout the whole country. It may be true that the Interstate Commerce Law has been poorly enforced, but what law has been enforced to the perfect satisfaction of all parties? Why, then, should we expect any better enforcement of this law,

which is, perhaps, one of the most difficult of all laws to enforce? Surely the Commission has not been indolent in conducting investigations, hearing complaints, and turning over whatever evidence it obtains to the various district attorneys. Since it is an administrative, and not a judicial tribunal, it has no power of itself to try and punish violators of the law, nor has it the power to compel witnesses to answer questions, without the order of a duly constituted court. The only power which it may legally exercise in this respect is that of investigation and prosecution.

An examination of the record of the Commission will show that its docket has been full to the limit of its capacity. It is difficult to see how it could have accomplished any more in the way of prosecutions, without neglecting some of its other duties. In the plan which we shall presently propose, the Commission will be relieved of the necessity of trying formal complaints, and of rendering long quasi-judicial decisions. Its whole duty will be that of effecting the enforcement of the existing law, and the prosecution of those who fail to observe it. In this way it is to be hoped that its docket will be sufficiently cleared to enable it to give more time to its essentially administrative and executive functions.

The other charges which have been the foundation of many of the attacks upon the present Commission, are of a more serious nature. For instance, Mr. James J. Hill testified before the Senate Committee that the Interstate Commerce Commission had issued orders which had practically ruined the export trade in flour of the railroad which he represented. This charge was subsequently taken up by the newspapers, and much capital was made of it by the opponents of rate regulation.

According to the testimony of Mr. Hill, flour could not be carried to the seaboard at the regular published rates, and then to the Orient at the current ocean rates, in com-

petition with the flour from India and Australia. The only way a traffic of this kind could be carried on was that the railroad should wait till some vessel was preparing to sail with less than a full cargo. Under such circumstances, it might be able to secure a special contract with the owners of the vessel, by which a through rate on flour would be made to the point of destination of the vessel, which might be much lower than the regular domestic rate to the seaboard.

In pursuance of the court decisions which had overruled it upon this point, the Commission had previously held that lower rates might be accorded upon export than upon domestic traffic, but it found nothing in the act which would authorize an exception to the provision that all rates should be published, and that a certain number of days' notice should be given before any advance or reduction of a rate. As a matter of course, railroads found it extremely difficult to publish a separate schedule of every shipment which was made upon such special contract with the vessel-owners. Then, too, they seldom knew the conditions upon which the contract would be made long enough in advance to give the legal notice required. The Great Northern and certain other roads, accordingly, refused either to publish their export rates or to give notice of intended changes. That which vitiated the practice was that notice of these special reductions was usually given only to certain favored shippers, who immediately contracted to supply the vessel with the desired addition to its cargo. The result was that this virtually amounted to a discrimination in favor of those shippers who were given notice of the special rate.

When the Commission was notified of these violations of the law, it at once conducted an investigation. In its decision it fully recognized the difficulties of the situation, and though the act authorizes no exception to the general requirements as to the filing and publication of

tariffs, it authorized temporary immunity from the application of the general rule. Upon this point it held as follows: [1]

> The carriers will be afforded an opportunity to adjust their tariffs and arrangements, and, if so advised, present the subject to Congress, provided, however, that in the meantime all carriers which do not publish and maintain import and export tariffs shall file with the Commission, as promptly as possible, a statement of the rates actually charged. If the act is not amended within a reasonable time, it will be the duty of the Commission to enforce the publication of import and export rates in the manner prescribed by law.

Surely this does not appear to be an unenlightened and rigid interpretation of the law by which the Commission expressly authorizes the doing of that which is undeniably a direct violation of the law, simply because it believed that economic considerations militated against the wisdom of the policy of its literal enforcement in all cases. It would appear that from another point of view this decision should be condemned for its extreme liberality, rather than for its rigidity in the interpretation of the law.

In accordance with this decision, the matter was presented to Congress at two consecutive sessions, but that body refused to take any action. When the matter again came before the Commission, its duty was plain. By its refusal to take action, Congress had signified its desire that the law should remain as it was. The only course which was then left to the Commission was that it should perform its legal duty of enforcing the law. Accordingly, it issued an order that carriers should publish and file with the Commission a statement of their proportion of the through export and import rates in the manner prescribed by law. The result of this order was that the Commission was heralded all over the country as willfully destroying

[1] In the matter of the publication and filing of tariffs upon export and import traffic. 10 I. C. C. Rep. 55.

an important portion of our foreign commerce. Surely the blame for this, if blame there be, rests with Congress, and not with the Commission, which was only performing its legal duty.[1]

We shall now consider the charge out of which the ablest of the opponents of the policy of increasing the powers of the Commission have made the most capital. It has been alleged by high authorities that the decisions of the Commission are permeated with a belief in the application of a drastic distance standard in rate-making. It is contended that the Commission, if it had the power, would attempt to put all localities upon an equal footing and to limit the area in which an industry may find a market for its products. Furthermore, it is alleged that the Commission would give undue weight to geographical situation, and that it would set itself in opposition to the policy of railroads in attempting to annihilate the disadvantages of distance.

Those who make such charges as these, are reënforced in their opinions as to the attitude which the Commission has assumed upon this point, by their very logical conclusions as to what they think must inevitably result from the interference of any public administrative body in the business of rate-making. With due respect to these great authorities, one may venture the opinion that they wrongly estimate the character of the work which has already been done by the Commission, and that a careful and impartial examination of all the cases which have been decided by that body will reveal the fact that, on the whole, their decisions have rested on the broad grounds of public policy. The Commission has allowed the utmost latitude to railway initiative, with the single stipulation

[1] See note, p. 96. Since the passage of the Hepburn Bill, in June, 1906, the Commission has several times authorized roads to adjust their export rates to meet changing conditions without the previous notice and publication which is required by law, on condition that they file with the Commission immediately a statement of the rates actually charged.

that the charges should not be extortionate, and that the small shipper and the small community should not be crushed in the interests of the large shipper and the stronger communities.

Perhaps one thing which has led to general misapprehension of the character of the Commission's work, has been that investigators have concerned themselves with those cases only in which action was taken favorable to the complainants, while they may have overlooked the practically equal number of decisions in which the Commission decided against the complainants. Indeed, it is surprising to see the number of cases in which the Commission has held out against popular clamor, and justified the railroads in practices which the public considered outrageous.

Within any brief space here available, it is impossible to refute successfully all adverse arguments which have been advanced, and to establish beyond question the favorable opinion expressed above, as to the work of the Commission. It must suffice, therefore, to cite only a few quotations from the rulings of the Commission, in certain leading cases, which tend to show that the Commission is not bound by any such narrow conception of the subject as has been commonly imputed to it.

In the New Orleans Cotton Exchange *vs.* Illinois Central, the Commission ruled as follows: [1]

> In determining such questions, a comparison of rates based upon the doctrine that the rate should be the same per ton mile is not applicable. . . . In solving questions of this character, the Commission will look at and consider every fact, circumstance, and condition surrounding the traffic. . . .

From the decision in the case of Evans *vs.* Oregon Navigation Company, we quote the following: [2]

> In determining what is a just and reasonable rate for a particular commodity, the Commission will take into consideration

[1] 3 I. C. C. Rep. 534. [2] 1 I. C. C. Rep. 325.

the earnings and expenses of operating, rates charged upon the same commodities upon other roads as nearly similarly situated as maybe, the diversities between the railroad in question and such other roads, the relative amount of through and local business, the proportion borne by the commodity in question to the remainder of the local traffic, the market value of the commodity, and its gradual reduction, the reductions made by the carrier upon other commodities which are consumed and necessarily required by the producers of the article in question, and all the other considerations affecting the traffic itself, and as related to other commodities entering into the charges of the carrier.

Surely such considerations would not harmonize with a blind distance basis for determining the reasonableness of a given rate.

In the case of the Eau Claire Board of Trade *vs.* Chicago, Milwaukee and St. Paul, we have a similar declaration against the distance system: [1]

The doctrine that transportation charges should be proportioned to distances between different points, where those distances are greatly dissimilar, has never been advocated by the railroads, nor recommended by the Commission. While distance is an ever present element in the problem of rate-making, and not infrequently a controlling consideration, the general practice of rate-making is opposed to the system of exact proportion, and there is no opportunity for its application under present conditions.

In the face of this evidence, it is impossible to maintain that the Commission is controlled by a blind belief in the wisdom of the policy of applying a uniform distance standard in rate-making.

Finally, it has been alleged that the Commission has steadily refused to give its sanction to what are known as group, or blanket rates, by which all competitors within a given section are placed upon an equal footing, the more distant points enjoying the same rates as those much nearer the common market. This contention, however, is

[1] 5 I. C. C. Rep. 264.

scarcely sustained by the facts. There are a few cases in which group rates over broad areas have been declared unlawful, but in almost every such instance, it has not been the group rate itself which the Commission has condemned, but the excessive charge to the nearer points.[1]

In fact, there are many cases in which the Commission has expressly upheld the legality of group rate over broad areas. In the case of William P. Rend *vs.* Chicago and Northwestern,[2] the Commission upheld group rates on coal from the mines of a large section extending across the state of Illinois, from which points blanket rates were made to points in a much larger section, extending across the state of Wisconsin, and embracing practically the whole of Minnesota and the Dakotas.

The charge has frequently been made that the Commission has blindly ordered reduction of rates, without regard to the ultimate effect of the reduction of the rate upon other rates, and upon other interests than those immediately concerned in the case in question. In fact Professor H. R. Meyer has made the statement that in practically every case where an American railway practice

[1] This was true in the famous New York Milk Case (7 I. C. C. Rep. 92) which has been so roundly condemned in many quarters. It is certain that some of the reasoning in that case might be justly censured, but the conclusion arrived at was fairly sound. It was not the low rate of thirty-two cents per can on milk brought from a distance of 250 miles which was objected to, but the excessive rate of thirty-two cents on milk from points within a few miles of the city. The order of the Commission reducing the rates from the nearer points left the railroads perfectly free to make similar reductions from the more distant points. The decision certainly has the appearance of being conservative, the greatest reduction ordered being only nine cents, which still allowed a rate of twenty-three cents from points only fifteen miles distant from the city. If the order of the Commission was as unjust as some would now have us believe, why did not the railroads carry the case to the courts on appeal, or simply refuse to obey the order, as they have done in other cases? From the liberal way in which the Interstate Commerce Law had previously been interpreted by the courts, it is evident that the railroads had no reason to fear that they would not be accorded fair treatment at the hands of the court. Their failure, therefore, to appeal the case would seem to indicate that the contention of the Commission was not without some justification.

[2] 2 I. C. C. Rep. 540.

has been condemned, the Commission has been blind to all interests save those of the complainant. With regard to this point, I quote from a further ruling in the case just cited:

> The question of relative injustice must be viewed upon broader grounds than a mere balancing of one rate against another. A reduction which will throw into confusion an adjustment of rates over a large section of the country which are not claimed to be unreasonable in themselves, should not be required without a clear right thereto exists under the law.

In the case of the Imperial Coal Co. *vs.* Pittsburg and Lake Erie, the Commission upheld a similar group rate on coal shipped to points on Lake Erie from a section around Pittsburg eighty miles broad, thus placing the mines over this whole area in a position of substantial equality. The following is an extract from the decision of the Commission in this case: [1]

> A group rate for a particular district upon a commodity for which a large demand exists, and intended to place producers in the district upon an equality among themselves, and with producers of the same commodity from other districts, all competing in a common market, is not unlawful merely on account of differences in the geographical location of the different producers, and their respective distances from market. . . . In determining the question of whether undue prejudices arise from the enforcement of a given rate, distance is only one of the factors, and other material facts, such as the character and quality of the commodity, cost of production, the extent and nature of the competition in the business itself and by other transportation lines, the interests of the public in the use of the commodity, and its market cost, are to be considered.

In the case of Nathaniel W. Howell *vs.* The New York, Lake Erie and Western, the Commission held as follows: [2]

> Prejudice and advantage becomes undue and unreasonable when the results are such as to effect some tangible injury to the

[1] 2 I. C. C. Rep. 618. [2] 2 I. C. C. Rep. 272.

complaining party. Without proof of damages resulting to the complainants an advantage in rates as related to distance is not necessarily undue or unreasonable, no substantial difference in the expense appearing to exist. . . . The existing arrangements by which the same rate is charged for the transportation of milk from all points reached by the regular daily route of milk trains of the defendant roads is found not to be illegal, and on the whole to be the best system which can be devised for the general good of all interested parties.

The foregoing quotations seem to disprove many of the charges which have been made against the *personnel* of the present Commission, by the more radical opponents of rate regulation. Such statements as that of Professor H. R. Meyer, which is to the effect that the Commission has condemned "all but one of the rate practices by which the railways have made themselves the most powerful single factor in developing the resources of our country," and that of Mr. H. T. Newcomb, who suggests that the Commission "manufactures a large part of the business it handles," are unreasonably extravagant, and so absurd upon their very face, that they serve to discredit work which might otherwise appear to be of great value.[2]

The main objection to the *personnel* of the present Commission arises from the inconsistency of its functions, which, the commissioners themselves are willing to admit, incapacitates them for the highest efficiency in judging of the reasonableness of the rates complained of. That body holds the anomalous relationship to the railroads of both police magistrate, prosecuting attorney, and judge. The law imposes upon it both the administrative duty of investigating alleged violations of the law and of prosecuting offenders, while at the same time it is given the quasi-

[1] The fundamental distinction between this case, and the milk case already referred to, is that in this case the rates from the nearer points were not found to be unreasonable in themselves, which was the ground upon which the other case was decided.

[2] See H. R. Meyer, *ante cit.* p. 440. Also H. T. Newcomb, *The Work of the Interstate Commerce Commission*, p. 17.

judicial duty of sitting as a court to try the cases in which it is itself frequently the prosecutor. Upon this point I quote from the testimony of Mr. Charles A. Prouty, one of the most prominent members of the Commission.[1]

> The Interstate Commerce Commission is at present an executive body. It is charged with the duty, within certain limits, of executing the law. It is our duty to enforce the criminal features of the law. Now, I am perfectly clear in my own way that those powers should be taken away from the Interstate Commerce Commission. In the first place, a body of five men is too cumbersome. . . . In the next place, I do not think you ought to combine in the same tribunal or the same body the executive, the administrative, and judicial functions. That is my attitude as a commissioner. If it is my duty to investigate, to unearth criminal violations of the law, I think I am very likely to get into a frame of mind which unfits me to dispassionately pass upon the rates made by the defendant; so I say now, and I have always said, that you ought to take away from the Interstate Commerce Commission, and put either in the Department of Justice or in the Department of Commerce and Labor, what I may call the executive functions of the Commission. Now the commission has certain judicial functions. I do not think that the Commission as now constituted, hearing cases as it hears them, receiving testimony as it receives testimony, ought to be charged with the judicial duty of trying a damage suit. . . . When it is done, it amounts to nothing. The order of the Commission is merely *prima facie*. The same suit must be tried over again, and I believe it would be better to try that suit in the first instance in the courts.

We have now discovered the two main considerations why we should not expect future decisions of the present Commission to be of the highest character desirable. In the first place, the Commission is bound to be more or less prejudiced by its previous interpretations of the law, which the courts have held to be erroneous. In fact, according to the public utterances of some of the commission-

[1] Statement of Mr. Charles A. Prouty before Senate Committee, May 18, 1905.

ers, these old interpretations still seem more reasonable to them than the construction placed upon the law by the courts. Secondly, the inconsistent functions of the Commission tend to unfit it for the most efficient service in any one branch of its various duties. It would seem, therefore, that the best results may be obtained by the creation of a separate tribunal for the purpose of trying the judicial questions at issue, thus leaving to the present Commission only the administrative and executive functions which it now exercises.

The main objections to the present system of Federal supervision of rates are: first, the long delays which the shipper frequently endures before he is able to secure redress; secondly, the existence of elements in the situation which render the Commission as it is now constituted, unfit for the most efficient service; thirdly, the inability of the tribunal whose duty it is to try cases of alleged unreasonable rates promptly to enforce its order and to issue an injunction compelling the railroad to cease and desist from charging the unlawful rates; and finally, the inability of the same body to name the extent to which the unreasonable rate in question is unlawful. We shall examine but two or three of the remedies which have been proposed.

In the first place, it has been suggested that the Commission be allowed to retain its present power of simply declaring a rate unlawful, but that the carrier should be obliged to modify its rates at once, in conformity with the order of the Commission, and to take upon itself the burden of applying to the courts for relief from the application of the order.

It is evident that a law conferring such power upon the Commission would be unconstitutional. The question whether a given rate is in conformity with the law or not is purely of a judicial character. According to Article III, Section 1, of the Constitution, the judicial power of the

United States is vested in one supreme court, and in such inferior courts as Congress shall from time to time establish. If, therefore, the Commission is given the power of determining the lawfulness of a given rate, and of temporarily enforcing its order, it must be constituted a court in accordance with the provisions of the Constitution; *i. e.*, the judges should hold office during good behavior, their salaries should not be diminished during their term of office, etc.

The law lays down certain principles; as, for example, the provision that all rates shall be reasonable, and that they shall not be unduly discriminatory. To leave to an administrative body the duty of determining whether this law has been violated, would be as clearly unconstitutional as to leave to a police officer the duty of determining whether or not a given individual is guilty of a crime, and of punishing him for an alleged offense. The only condition which prevents the present Interstate Commerce Law from being declared unconstitutional is that the findings of the Commission have no legal force whatever.

The conclusion just stated is sustained by several important decisions. In the maximum rate decision,[1] the Supreme Court clearly held that the determination of the reasonableness of a given rate was a judicial and not a legislative question. In the case of Chicago, Milwaukee and St. Paul *vs.* Minnesota,[2] the Supreme Court held as follows:

> The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination.

Equally important in establishing this point of view

[1] 167 U. S. 479. [2] 134 U. S. 418.

is the important dictum in the case of Reagan *vs.* Farmers' Loan and Trust Company.[1]

> Yet it has always been recognized that if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into the matter, and to award to the shipper any amount exacted from him in excess of a reasonable rate. . . .

If then, the determination of the lawfulness of a given rate is a judicial question, it should properly be left to duly constituted courts. What is the use of having a Commission sit in a long judicial process, and write a lengthy opinion upon every case which comes before it, when neither its findings of facts nor a line of its opinion have any legal value whatever?

Nor would it be constitutional to make its findings of fact final, for such findings are essentially of a judicial nature. Even the evidence which is taken by a quasi-prosecuting body which has no judicial character, and which is not bound by the ordinary rules of evidence, could not be used as an exclusive basis for subsequent judicial action. It follows that no remedy for the present unsatisfactory state of affairs lies in any enlargement of the powers already possessed by the Commission.

The other alternative is to confer upon the Commission an entirely new power, *i. e.*, the discretionary power of fixing rates. This has been the intent of most of the recent bills brought before Congress, as for example of the Hepburn Bill.[2] In some respects the proposed measure is conservative and salutary. It does not confer upon the Commission the power to fix differentials or to establish minimum rates. It includes certain salutary provisions calculated to remedy various evils which have grown up in connection with our transportation system, and for which our laws have hitherto failed to provide adequately, but its most important provision is that which

[1] 154 U. S. 362.

[2] Passed and signed by the President, June 29, 1906.

confers upon the Commission the power to prescribe maximum rates in all cases of complaint, after allowing due hearing to all parties concerned. This power, which the courts have held has not been conceded to the Commission, it has in fact never exercised.

There is a vast difference between determining the extent to which a given rate is unlawful, and the exercise of a discretionary power to fix a maximum rate to apply for the future. For instance, the railroad may be charging a rate of one dollar upon a given article. It is possible that any rate in excess of ninety cents might be unreasonable, within the meaning of section one of the act to regulate commerce. To order the road to cease charging more than ninety cents for the given service, would be to compel it to cease doing that which is unlawful, which is a legitimate function of a court of equity. On the other hand, if the railroad were ordered to charge no more than seventy-five cents, we have a clear exercise of discretionary power, such as the Commission will possess under the Hepburn law. Before that law takes effect, neither the courts nor the Commission can reduce such a rate to a point below ninety cents, at which point it ceases to be unlawful. Under that law, however, the Commission will have full power to name any rate it sees fit, with the single provision that it shall not take the property of the railroad without due process of law. Perhaps any rate which might be fixed above forty cents might not be confiscatory. The Commission might, therefore, establish a rate anywhere between forty and ninety cents, entirely at its discretion, and as we shall presently show, the courts would have no power to review orders which were based upon the right to exercise this discretionary power.

It is not our intention, at this point, to reopen the subject of the advisability of giving the Commission this power. That point has already been dealt with. It will be assumed, therefore, that we have proved that what is

needed is a better and more expeditious method of compelling the railroads to conform to the existing law, rather than a system of government-made rates.

The constitutionality of the delegation of the discretionary power of fixing rates to a commission has been seriously questioned. The function of rate-making has been held to be legislative in character, and it is one of the fundamental principles of constitutional law, that legislative power cannot be delegated. It is also urged that the power of Congress over interstate commerce is not coextensive with the power of the States over their internal commerce. In the first place, the powers of Congress are limited to those expressly delegated or implied, while the States possess every power which is not denied them. Furthermore, railroads do not derive their incorporation nor the right to exercise the power of eminent domain from Congress, but from the States. It is also alleged that the right to engage in interstate commerce is not a privilege which may be conferred by Congress, or one which may be withheld by that body, but a constitutional right of every citizen of the country. The consensus of opinion, however, is against those few able jurists who doubt the constitutional authority of Congress to fix rates in interstate transportation.

On the other hand, more serious doubts are entertained as to the constitutionality of the delegation of this power to an administrative commission. This particular question has never been decided, because Congress has never seen fit to delegate that power. The dictum of the Supreme Court in the maximum rate decision, however, would seem to indicate that in the opinion of the highest court in the country, Congress may delegate that power to a commission: [1]

> Congress may itself prescribe rates; or it may delegate that duty to some subordinate tribunal; or it may leave with the companies the right to fix rates. . . .

[1] 167 U. S. 479.

Also, in the case of Field *vs.* Clark,[1] the Supreme Court upheld the reciprocity provision of the McKinley Act of 1890, which authorized the President to place retaliatory duties upon commodities imported from other nations whose reciprocal tariff schedules he deemed unjust. The distinction made in this case was that such a provision was not a delegation of legislative power, but merely the delegation of the power of determining the facts upon which a law already made should become operative. Even if such a distinction as this is valid, it is difficult to carry the reasoning over into the field of the delegation of the discretionary power of fixing rates at any point above that where they become so low as to be confiscatory. If this power were granted to the Commission, every decision of that body would be in effect a law of wide import, and we should then have a Federal legislative body, second in importance only to Congress itself. It is doubtful whether such a provision would be consistent with the constitutional provision that all of the legislative power of the United States should be vested in Congress.

Such cases, however, have frequently come before the State courts, and there has not been a single decision against the constitutional right of the legislature of the State to grant this power to a commission. These cases were practically all decided upon the same grounds.[2] From the opinion in the Georgia case, which is typical, we quote the following:

> The true distinction, therefore, is between the delegation of power to make law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made.

[1] 143 U. S. 649.

[2] Georgia R. R. Co. *vs.* Smith, 70 Ga. Rep. 694. Tilley *vs.* Railway Co., 4 Woods, 427. McWherton *vs.* Pensacola R. R. Co., 24 Fla. 417. Express Co. *vs.* Railway Co., 111 N. C. 463. Chicago, etc., Railway Co. *vs.* Dey, 35 Fed. Rep. 866.

However, it is by no means certain that the Federal Constitution would be interpreted as these State constitutions were, and the question as to the way in which this point will finally be decided by the Supreme Court, can only be a matter of speculation. However, since Congress probably has the power to fix interstate rates, and since the intelligent exercise of that power by that body would be entirely out of the question, it must not be supposed that this is a *casus omissus* of the Constitution, and that Congress has no right to do that which is the only practical method of carrying its admitted powers into execution.

The other constitutional limitation affecting the proposed delegation of rate-fixing power to a commission, is the provision which forbids the giving of preference to the ports of one State over those of another. In the Wheeling Bridge case,[1] it was held that this clause did not apply to every incidental preference which might result from a reasonable exercise of the admitted powers of Congress, and manifestly it does not mean that Congress must apportion all its expenditures, such as those for harbor improvements, with mathematical precision among the ports of the various States. The object of this provision was evidently to prevent direct discriminations which would put one port at a permanent disadvantage as against another. What could accomplish this in a more direct and immediate way than an unequal adjustment of railway rates? Under the present system, the railways continually discriminate against the port with the natural advantages, and they endeavor to put all ports upon an equal footing. Thus the rate from Chicago to Baltimore is just enough lower than the rate from Chicago to New York, to make the through rates, *via* either point, practically the same to Liverpool. In this way competition is encouraged, and population and commerce is decentralized.

If, however, the rate-making power were lodged in a

[1] 18 Howard, 421.

governmental tribunal, it would not be lawful for that body to authorize such preferences as had previously been given to such ports as Baltimore and Norfolk. The Commission would be violating the constitutional provision, if it were in this way to confiscate the natural advantages of such ports as New York through its regulation of railway rates. If the Commission should sanction a lower rate to Baltimore than to New York, it would obviously be granting an unlawful preference to Baltimore.[1] In other words it is possible that this most beneficent practice of the railroads would have to be abandoned, owing to the inability of the Commission to give it legal sanction. At all events the conferring of the power to fix rates could not be held to be unconstitutional, simply because circumstances might arise in which that power might be unconstitutionally exercised.

The next point which we wish to make is that when a rate is made by the Commission in pursuance of this discretionary power, it would not be subject to judicial review, except upon the grounds of the legality of the order. Such an order would have the same force as a legislative enactment, and the courts would have no authority to set it aside, unless it appeared that it violated the constitutional rights of some interested party. In fact, the courts have frequently affirmed that they have no authority to review the discretionary acts of the political agents of the Government.

In the case of the San Diego Land Co. *vs.* National City,[2] we have an emphatic declaration of this principle:

> The judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without com-

[1] If the Commission is not given the power to name differentials or to set minimum rates, such questions will not be so likely to arise.

[2] 174 U. S. 739.

pensation, as under all circumstances is just both to the owner and to the public; that is, judicial interference should never occur, unless the case presents clearly and beyond all doubt, such a flagrant attack upon the rights of property, as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for public use.[1]

The extreme reluctance of the courts to declare a rate confiscatory, after it has been fixed by the political agents of government, is shown by the fact that during the twenty years or more in which State commissions have exercised the power of rate-fixing, but four or five cases have gone to the courts on the grounds that the rate fixed were confiscatory, and in the majority of those cases in which this point was at issue, the courts have decided in favor of the legality of the order.[2] We conclude, therefore, that the delegation to a commission of discretionary power in fixing rates in all cases of complaint, must be regarded a radical departure from any system of Federal regulation

[1] Other cases in which the same principle is asserted are: The Chicago and Grand Trunk *vs.* Wellman, 143 U. S. 399. Reagan *vs.* Farmers' Loan and Trust Co., 154 U. S. 362. Smyth *vs.* Ames, 169 U. S. 466. Henderson Bridge Co. *vs.* Kansas City, 173 U. S. 592.

[2] Just as this is going to press, word has come that the Supreme Court of the United States has rendered a strong opinion affirming a decision of the Supreme Court of Florida which in turn had sustained an order of the railway commission of that State which imposed a maximum rate of one cent per ton mile on phosphates, which traffic constituted about 17 per cent of the carriers' business.

It was strongly urged by the carriers that this rate was so low as to be confiscatory, but the Supreme Court held that the burden of proof was on the railroads to show that rates which had been promulgated by a commission in pursuance of powers conferred upon it by the legislature, were so low as to clearly and necessarily deprive them of the right to earn a fair return upon their capital investment.

It is clear that this is a difficult matter where the rates which have been fixed by the commission apply to only a single commodity, as was the case in the particular instance under discussion. Only under extraordinary circumstances would it be possible to show that such a rate would necessarily be confiscatory, while if the Commission had been empowered to reduce the rate only in case the existing rate were clearly proved to be unreasonable, the tables would have been entirely reversed, and it is probable that the order of the commission in such a case would have been held invalid.

which has been practiced in the past. The general dissatisfaction of shippers with rates made by the railroads, would compel the adjudication of nearly every important rate. Responsibility for rates charged would be transferred from the railroads to the Commission, and the system would be attended with all the evils which, we have already pointed out, would inevitably be concomitant with any system of government rate-making.

Considerable doubt has been expressed as to the meaning of the amendment offered to the Hepburn Bill providing for judicial review of the order of the Commission, and for temporary injunction to prevent its execution. If the intention were to give discretionary power to the courts to review the orders of the Commission with respect to their wisdom or policy, it is obviously unconstitutional, since, as we have already pointed out, such a power cannot be conferred upon the courts. If it is the intention to give to the courts the right to review the orders of the Commission on the ground that some of the constitutional rights of the carrier or other interested parties have been violated, the amendment is useless, for the courts would have that power anyway, and it would clearly be unconstitutional to deny it to them. This point was expressly decided in the case of Chicago, Milwaukee, and St. Paul *vs.* Minnesota, in which it was held that a law of Minnesota which made the action of its commission final, and did not permit of judicial review, was unconstitutional.[1]

If, however, the intention of the amendment was to give to the courts the right to review the question of the reasonableness of the original rate as well as the legality of the rate fixed by the Commission, its meaning gives rise to considerable doubt. It is quite possible that if the clause giving the Commission the power to substitute that which it considers a reasonable rate for that which is found to be unreasonable, may be construed as allowing it to substi-

[1] 134 U. S. 418.

tute a rate only for that which already is actually unreasonable, according to the provisions of the Interstate Commerce Law, the courts may hold that the exercise of the discretionary power of the Commission is lawful, only when the existing rate may be judicially declared unlawful. If the proposed amendment becomes a part of the law, and this interpretation is placed upon it, the courts will still retain the power to set aside the orders of the Commission much as they have done in the past.[1]

We are now ready to propose a plan, alternative to that of giving to the Commission the discretionary power of fixing rates, which we believe we have shown would be attended with serious evils. The Interstate Commerce Law provides that the rates of common carriers engaged in interstate commerce shall be reasonable and not unduly discriminatory. It is not so much a system of government-made rates which the public demands, as a more expeditious plan for punishing and preventing violations of this law.

The question as to what constitutes an unreasonable rate within the meaning of the law, is, as we have already

[1] The recent action of the Senate in striking out the words "in its judgment," may result in defeating the main purpose of the bill. This will give the Commission the power only to substitute a reasonable rate for that which is found to be unreasonable. The courts may now construe the law as giving them the right to review the question of the reasonableness of the original rate. If the original rate were found to be reasonable, the order of the Commission reducing the rate might be held to be unreasonable, even though it might not be confiscatory. The Commission would then have no power to reduce a rate which was already in conformity with the law. The law would then be very similar to that of Iowa, which in providing for the enforcement of the orders of the Commission gives opportunity for court review as follows:

"If the Court shall find that such rule, regulation, or order is reasonable and just, and in refusing compliance therewith said company is failing and omitting the performance of any public duty or obligation, the Court shall issue a mandatory or perpetual injunction, compelling obedience."

It must be admitted that such a construction of the Hepburn Bill would be rather strained, but no more so than some of the constructions which have been placed upon the original Interstate Commerce Law, and we may be assured that the courts will so interpret the law, as to leave their powers of review as broad as possible.

pointed out, essentially judicial in its character. It should therefore be left in the hands of the courts, where it belongs. In fact, that power could not be constitutionally delegated to any other body, since the Constitution vests all judicial power in the courts.

But the present process before the courts is cumbersome. The existing Federal courts are already overburdened with work, and to add to their duties would only increase the difficulties and prolong the delays. Moreover the question of the reasonableness of a given rate is an exceedingly difficult one, perhaps the most difficult of all judicial problems. The judges of the ordinary courts, whose range of knowledge must extend over a wide variety of subjects, are poorly equipped for dealing with questions of such special and intricate character. We propose, therefore, that a special court be established for the purpose of determining the lawfulness of the rates charged by common carriers. This court should be composed of five or seven members. The salary and dignity of the judges should be raised, if possible, to a point equal to that of the members of the Supreme Court. The transportation court should have final jurisdiction in all cases except where its order is alleged to violate some of the constitutional rights of the carrier, or other interested parties, in regard to which point the Supreme Court should have appellate jurisdiction. The main advantages of this plan over others which have been proposed may be briefly summed up as follows:

1. It seeks merely to control the carriers with respect to their unlawful actions, and it does not involve an attempt on the part of the Government to decide for them questions of policy, nor does it take away from them the right to make whatever charges they see fit, within the limits of the law. Thus, if a rate of ninety cents were the highest rate which would be reasonable, this court would have no authority to order a reduction to a point below

ninety cents. On the other hand if the Commission is given discretionary power to fix rates, it might order a reduction to any point above forty cents, providing that were the point where the fixing of the rate would be confiscatory. By far the larger proportion of the rates of this country vary between these two extremes. The rate may be sixty or seventy cents, according to what policy may dictate in each individual instance. It is our opinion that the railroads themselves can better decide these questions than a government commission. Under the plan which we propose, the vast majority of the rates of this country would be unaffected, while if the Commission is given the power to fix rates, every dissatisfied shipper may go to the Commission with a complaint, and that body would be under the legal obligation of substituting its views of the policy of the enforcement of a given rate for those of the railroad.

2. The present Commission would become a more efficient body. It would be relieved of the necessity of wasting a considerable portion of its time in hearing formal complaints, and in writing long judicial opinions, which have practically no legal value. It would thus have more time and energy to devote to the performance of its other functions. It could hear formal complaints, and act as a board of arbitration to settle disputes between the carriers and the shippers out of court whenever possible. Moreover, it would continue to act as a public executive and administrative body, while its general supervisory powers over the railroads would remain the same. It could then give more attention to detecting violations of the law, and through its attorneys it could act as a public prosecuting body, in all cases where alleged violations have occurred.

3. There is reason to expect that the decisions of this new court of transportation would be more in accordance with the law as it has been interpreted by the courts, and more equitable to the carriers, than would be the decisions

of the present Commission. As we have already seen, the members of the existing Commission are more or less prejudiced in favor of their previous interpretations of the law, and they are rendered unfit for the most efficient judicial service by their inconsistent functions.

4. The plan which we propose is more expeditious. Informal complaint as to any unreasonable rate could be made directly to the Commission. If that body should be unable to bring about an amicable settlement, it might within very short notice, if the facts seemed to warrant it, bring a formal complaint before this court of transportation. This court, having no other function to perform than the trial of this particular class of cases, would probably be able to take the matter up immediately. After due hearing to all parties interested, a decision could be rendered, and the order of the court could go into effect at once.

5. The constitutional and practical difficulties of putting the order into effect immediately would be eliminated. The problem of the length of time which ought to be allowed before the order of the Commission should go into effect, and how justice could be rendered to both parties pending the final decision by the courts, has been one of the principal obstacles in the way of the proposed legislation, the intent of which is to confer rate-fixing power upon the Commission. If the original Hepburn Bill becomes a law, the order of the Commission will go into effect within thirty days. If this order should subsequently prove to be a violation of the constitutional rights of the carrier, there would be no redress for the loss which it may have sustained in the interim between the time when the order of the Commission went into effect and that of the final disposal of the case by the courts.

The other plan which has been suggested is that an amount representing the difference between the rate ordered by the Commission and the former rate should

be held in escrow and paid to the carrier or to the shipper respectively as the final decision by the courts favored the one or the other. Such a plan would lead to great confusion in accounting, and it is probable that only the larger shippers would take the trouble to keep the certificates, and to proceed for recovery in case the decision of the court upheld the order of the Commission. At any rate, this plan has but little merit, for the shipper is generally not the one who is injured by the enforcement of an unreasonable rate, but the consumer, and no practicable plan has yet been suggested, whereby redress may in such a case be made to the consumer.[1]

Under the plan which we have suggested, on the other hand, if the carrier has been allowed a full hearing in a duly constituted court, the order of the court could go into effect at once. Even if the Supreme Court should subsequently reverse the decision upon constitutional grounds, it could not be affirmed that the enforcement of the order of the transportation court in the interim had been without due process of law. Circumstances in which hardships are wrought by the temporary enforcement of wrong decisions of the lower courts, are a commonplace in judicial procedure. It is frequently the case that a man whom the higher courts declare to be innocent, may have been held for several years pending the final decision. There may be

[1] It has been urged that the keen competition of producers and shippers would lead to lower prices by way of discount upon the future action of the court. This might be true in some cases, and it is not altogether improbable that instances might arise where the consumer would receive the entire benefit accruing even before the final decision by the courts. But such action upon the part of the shippers and producers would not be in accordance with sound business principles. They might easily overestimate the probability of the court sustaining the order of the Commission, and if they should make prices upon the assumption that the order of the Commission would be upheld, and they should subsequently be disappointed in their expectations, many of them might be driven into bankruptcy. This would be especially apt to be true of jobbers in such articles as grain and coal, who usually do business upon a small margin, and into which commodities the rate enters as a strong factor in determining the value.

an element of injustice in such procedure, but with our fallible institutions, it is probably the best that society can offer. That which is important for the preservation of our free institutions, is that the order which imposes the temporary hardship should come from a duly constituted court, and with due process of law.

A further consideration along the same line is that there would be less probability that the order of this court would be confiscatory than the orders of a commission with the discretionary power to fix rates. As we have already pointed out, this court would not have the right to exercise discretion in fixing rates at any point above that where they began to be confiscatory, but only to order the carrier to cease and desist from collecting that portion of a rate which serves to make it unreasonable.

6. The plan which we advocate possesses equal advantages with the provision of the Hepburn law, which lays upon the railroads, and not upon the public, the burden of appeal.

7. This court would have a tremendous advantage over a commission in deciding questions as to the reasonableness of the charges for transportation, in that it would have all the machinery of a regular court at its disposal. It could enforce the giving of testimony, and punish for contempt by summary process. Under the present system a witness may refuse to give testimony whenever he choses. The law requires witnesses to answer all pertinent questions which are put to them in proceedings before the Commission, but there are no means by which the Commission may summarily enforce the giving of such testimony. Accordingly whenever a witness refuses to answer a question, it is necessary for the Commission to begin separate proceedings in the courts in order to secure a writ of mandamus compelling the witness to answer the question which was put to him. This process necessarily entails long delays. Nor would it be possible to give to a Commission

which is a quasi-administrative body, the judicial power of enforcing testimony and summarily punishing for contempt. That would be a perversion of the Constitution, which vests all the judicial power of the United States in the courts.

8. The judges of this court, being necessarily appointed during good behavior, and being independent as to their salaries, would be much less amenable to political and sectional influence. It is much less likely that a judge who holds office for life would be inclined to listen to the arguments of politicians and the clamor of the constituents in particular sections, than that commissioners who must look to the political power for reappointment at the end of every six years, should be amenable to the same influences.

Thus it may be hoped that the main difficulty which inevitably attends every attempt on the part of the Government to exercise any supervisory power whatever over rates may be partially removed.

9. The superiority of this plan to that of leaving the matter of determining the reasonableness of transportation charges to the ordinary courts of law, is no less apparent. Surely men who have made their life business the study of the special problems of transportation, would be better qualified to pass judgment upon those problems, than the judges of ordinary courts, who, owing to the nature of their duties, can give but a small portion of their time to the study of these intricate problems.

There are still a few important considerations which have a direct bearing upon the plan which we propose. In the first place, it is apparent that Congress could not delegate to this court, or to any other court, the discretionary power to fix rates, such as is given to the Commission under the Hepburn law. We have already shown that rates which have once been fixed by a commission to which that power has been delegated, have practically the force of law, and cannot be a subject of

review by the courts, except as to the constitutionality of the order enforcing them. But it is certain that a court would not have the right to exercise this quasi-legislative power, even if it were delegated to it by Congress. The function of a court is to determine whether an existing law has been violated, to punish those who have been convicted of having violated the law in the past, and to enjoin its continued violation in the future. The court, therefore, cannot itself make the law which it is constitutionally bound to enforce.

The very point for which we are contending was decided in the case of State *vs.* Johnson.[1] In that case it was held that the law of Kansas which gave the power of fixing rates, upon the complaint of any shipper, to a special court known as the Court of Visitation, was unconstitutional, in that it was an attempt to confer administrative and legislative powers upon the judiciary. That the Supreme Court would adopt the same view in case Congress attempted to delegate this power to a court, appears from the following dictum in the case of Reagan *vs.* Farmers' Loan and Trust Company:[2] "As we have already seen, it is not the function of the courts to establish a schedule of rates. . . ."

The Constitution of the United States, which vests all the legislative power in Congress, and the administrative power in the President and his subordinates, gives no authority for vesting any portion of these powers in the courts.

We now come to consider those objections which have hitherto been generally regarded as fatal to any scheme such as we have proposed. It has been contended that such a court would not have the power to declare the extent to which a given rate is unreasonable. It is alleged that its only power would be to award damages for the collection of excessive rates in the past, and to enjoin the

[1] 61 Kansas, 803. See also 69 Minn. 353. [2] 154 U. S. 400.

enforcement of a given unreasonable rate in the future. Since the discretionary power of fixing rates cannot be given to a court, it is alleged that the transportation court, in declaring the extent to which a given rate is unlawful, would be thereby setting a maximum rate for the future, and thus exceeding its powers.

It is argued, therefore, that the plan which we propose would be but a slight improvement over the present plan. In case the transportation court found a given rate of $1.00 unlawful, it is alleged that the railroad might comply by a nominal reduction to 99½ cents. The whole case would then have to be tried *de novo*. This process of enjoining and nominal compliance might go on indefinitely, and it would take many decades to reduce the rate to a point where it would be reasonable.

This contention, though supported by eminent jurists, can hardly be sustained upon sound legal principles. It has always been a legitimate function of a court of equity to forbid continued violations of the law. By the issue of injunctions, multiplicity of suits may be avoided, and large numbers of individuals, each of whom suffers but slight damage from the doing of the unlawful thing, may thus be saved the necessity of bringing separate suits for every case of injury. A court may, therefore, enjoin the performance not only of a part, but also of the whole of an unlawful thing. In fact, unless there were some extenuating circumstances, the court would not be performing its constitutional duty, if it were to forbid the doing of a certain part, but not the whole of an unlawful practice. For instance, if my neighbor keeps a large pile of unsightly and unsavory rubbish upon his property next to my dwelling, the court may not only enjoin the keeping of the pile of rubbish of this particular size and shape, but it may order the removal of the whole pile, or such part of it as may be deemed unsightly or a menace to health.

Again, if some person attempted to erect a forty-story

sky-scraper, and the evidence showed that such a building would be a menace to life and property in the immediate neighborhood, the court might issue an injunction preventing its erection. Surely, it cannot be said that the order of the court would be limited to the two alternatives either of enjoining the erection of any building whatever, or the enjoining of the erection of a building of the character proposed which would be forty stories in height. In the one case, the constitutional rights of the owner of the property would be violated. In the other case, the owner might comply with the order by the erection of a building of thirty-nine and a half stories, by which the service of the court would be rendered practically nugatory. If the evidence showed that any building of the character proposed which should be higher than thirty stories would be a menace to life and property in the immediate environment, the court might enjoin the erection of any building of that character higher than thirty stories. In doing this, the court would not be making the law for the future. The old proverb that one should so use his own property as not to injure or jeopardize the lives or property of others has been established in law as long as legal institutions are known to have existed. The court would merely be determining the extent of the unlawfulness of the proposed action of the owner of the property, which is exactly the power which we contend that the court would have in determining the extent to which a rate complained of is unlawful.

The building case [1] just cited is exactly in point. Obviously, the court could not be given the discretionary power of issuing quasi-legislative orders, determining the legal height of buildings or the character of excavations which might be made by the owners of property, but in any given case which is brought before it, it may not only

[1] We have assumed, in this case, that there are no definite building laws limiting the height of buildings, etc.

determine the question whether the action of the defendant is in violation of the law, but also it may declare to what extent, and in what respects, it is in violation of the law, and it may order that no part of the unlawful thing shall be performed.

Suppose a railway were charging a rate of $1.00 and 90 cents were the maximum rate which would be reasonable. The charge of $1.00 would then be unlawful, but not the whole of that charge. It is only that portion of the charge which is in excess of ninety cents that may be declared unlawful. But the whole of that excess charge of ten cents is unlawful. The court may order the carrier to cease and desist from doing an unlawful thing. Furthermore, it may order the railroad to cease and desist from doing *the whole* of the unlawful thing, and not simply an infinitesimal part of it, as some would have us believe. It may, therefore, order that the rate should not exceed ninety cents, which is the maximum rate which the law allows. In doing this the court would exercise no legislative or discretionary power whatever. Its function would be purely judicial. Its business would be to decide in what respect and to what extent the action of the carrier is a violation of the law, and to enjoin the doing of the unlawful thing. To be sure, this is a difficult problem, and there seems to be no exact line of demarcation between what is a reasonable and what is an unreasonable rate, but nevertheless, the question is purely judicial in character.

The simplest definition of an unreasonable rate is a rate which is so high, and so greatly out of proportion to the general practice of railroads, that it cannot be justified upon reasonable grounds. Of course it is difficult to find the exact point at which a rate begins to become unreasonable, but a similar difficulty is frequently met with in other forms of judicial procedure. In the building case above cited, it might be somewhat difficult to show that a building of twenty-nine stories would be perfectly safe,

and that a building of thirty-one stories would be extremely dangerous. Owing to the limited extent of human knowledge, and the necessarily limited and inaccurate data, it would be absolutely impossible to determine this point with precision. The best which a court could do, in such a case, would be to sum up the evidence which was presented to it, and if the indications were that a building of thirty-one stories would be unsafe, it would issue an order enjoining the erection of a building of more than thirty stories, the assumption being that a building of that height would be safe, while a similar building thirty-one stories in height would be dangerous. These findings of the court, for all intents and purposes, must be held to be correct.

In almost every case which comes before the courts involving money damages, such damages are awarded for things which are entirely incommensurate with money. For instance, how is it possible to determine with mathematical precision the money value of an arm or a leg, of wounded feelings, or of an injury to business reputation? Such awards can only be regarded as elements of alleviation for the injury inflicted, and yet it must be assumed that the court in rendering those awards, has performed substantial justice. So, also, in the matter of reasonableness of railroad rates. The function of this court would be to determine, as nearly as possible, with the limited resources available, the facts as to the reasonableness of rates complained of, and to issue its order in conformity with those findings of fact. Its findings must then be assumed to have been accurate, and should have the same legal force as if it were known that they were absolutely precise.

It is generally admitted by all jurists that a court may declare to what extent a rate collected in the past is unreasonable, and that it may award damages for whatever charge has been made in excess of that amount. But it is contended that a court may not declare the extent

to which the rate of the carrier is unreasonable when applied to the future. The argument is that such an order of the court would have the legislative force of establishing a maximum rate for the future, since conditions may at any time so change as to render the former unreasonable rate of the carrier reasonable and therefore lawful. The distinction, however, is not a good one. No injunction which a court may issue with regard to other matters would have any force whatever unless it were to apply to the future. But there are few circumstances in which conditions might not so change as to render the former unlawful act lawful. But this has never been held to bar the court from issuing the injunction.

On the contrary, the courts have frequently held that the fact that conditions may change is no bar to the issue of an order by the court forbidding the continued performance of an act which was unlawful in the past, and which, without a radical change of conditions, would continue to be unlawful in the future. The very point for which we are contending was decided in the case of Janvrin *vs.* Revere Water Company.[1] A statute of the legislature of Massachusetts required water companies within a given district to furnish their patrons with water at reasonable rates, and provided that any person who believed himself charged an unreasonable sum might apply to the Supreme Court of the State, which court, after allowing due hearing, might declare what should be the maximum legal rate, which, in accordance with the statute, the water company might charge for the future. In upholding the constitutionality of this statute, the court held as follows:

> The statute calls upon us to fix the extent of the existing rights. With regard to such rights, judicial determinations are not confined to the past. If it may legitimately be left to the court to decide whether a bill for water furnished was reasonable, and if not, to cut it down to a reasonable sum, it equally may be

[1] 174 Mass. 174.

left to the court to enjoin the company from charging more than a reasonable sum in the immediate future. . . .

But suppose the party aggrieved should obtain an injunction, obviously the decree would be so drawn as to bind the defendant for a reasonable time, or if it were drawn in the common form, subject to review on a change of circumstances, the court would not be likely to grant a bill of review until a reasonable time had elapsed; and if the legislature should say that in these cases five years was a reasonable time, we could not say that it was wrong.

In the case of the United States *ex rel.*, Kingwood Coal Co. *vs.* West Virginia and Northern,[1] a Federal court adopted a similar point of view. In that case, the court went so far as to apportion the cars of the carrier among the various shippers, in accordance with what would have been proper in the past. This order was made to apply to the future, though it was evident that conditions might change at any time, so that the apportionment would be no longer just.

In the Cattle Raisers' Case,[2] the court clearly assumed the right to enforce the order of the Commission, if it had been justified by the facts upon which it was predicated. If, therefore, it had been found that any charge in excess of $1.00 was unlawful, as the Commission had declared, the court would have issued an injunction forbidding the collection of a terminal charge in excess of that sum.

In the case of the Missouri Pacific *vs.* The United States,[3] the Supreme Court held that since the passage of the Elkins law, the court might lawfully issue an injunction forbidding the carrier from unjustly discriminating against the city of Wichita in favor of Omaha. It would be rather an anomalous interpretation of the law which would enable a court to forbid a discrimination altogether, and

[1] 152 Fed. Rep. 252. 134 Fed Rep. 196. This decision was sustained upon appeal to the Circuit Court. See also Schofield *vs.* L. S. & M. S. Ry., 43 Ohio State Rep. 571.

[2] 186 U. S. 320.

[3] 186 U. S. 320.

at the same time prevent it from declaring to what extent a given discrimination is unlawful.

Suppose the rate to point A were eighty cents, while the rates to points B and C were both $1.00. Assume also that no discrimination between points A and B could be justified upon reasonable grounds, while only a discrimination of ten cents could be justified between points A and C. According to the decision which has just been cited, the court would have the authority to issue an injunction forbidding the whole of the discrimination between points A and B, but some would have us believe that point C is without equal opportunity for obtaining relief. It is evident that the elements of the problem are the same in each case. It is necessary that the injunction of the court should apply to the future in both cases. Conditions at B are as liable to change as those at C. There is the same difficulty in determining with mathematical accuracy, that there ought to be no discrimination whatever against B, as there is in determining that there ought not to be any discrimination greater than ten cents against C. How could a court rule otherwise, in case the rate to C were in question, than to order the carrier to make no more than a reasonable discrimination, which, according to the evidence in the case, would not exceed ten cents?

Obviously, the court would not have the power to forbid the whole of the discrimination against C, as it would have in the case of B, but it would have the power to forbid the whole of the unlawful part of the discrimination, which in the assumed case is ten cents.

In Smyth *vs.* Ames,[1] the Supreme Court held that the rates fixed by the legislature of the State of Nebraska were confiscatory. That decision was necessarily based upon past transactions. Yet the court held that it might lawfully issue an injunction against the enforcement of the rates made by the legislature in the future. This

[1] 169 U. S. 466. See also Social Circle Case, 162 U. S. 184.

ruling was made notwithstanding the fact that conditions might at any time so change as to render the rates fixed by the legislature no longer confiscatory. The court, therefore, provided for an application for a modification of its decree in case such circumstances should arise.

In the face of this long line of judicial opinions, it is evident that the right of a specially constituted transportation court, to enjoin the enforcement of the whole of the unreasonable, or the unjustly discriminatory portion of a rate which is in dispute, is established beyond all reasonable doubt. But even if the courts should hold otherwise, it would not be wholly fatal to the plan which is here proposed. The mere power of enjoining the enforcement of a given rate, and of awarding damages for excessive charges in the past, would do much to compel the railroads to obey the law. If the railroads made only nominal reductions, it would be possible to impose additional penalties for the collection of an unreasonable rate which constitutes only a nominal reduction from a rate already declared by the court to be unlawful. The fact that, even under our present inadequate system, railroads, in over ninety-five per cent of the cases where they have not entirely refused to obey the order of the Commission, have made substantial compliance with its order, goes to show that when a given rate has been declared unlawful, the roads are not prone to make nominal reductions, as is sometimes alleged. They are well aware that if they should act in this manner they would be but inviting more drastic legislation on the part of Congress.

The question naturally arises, whether the railroads, after a given rate has been declared unlawful by the proposed court, might, upon a change of conditions, violate the provisions of the injunction at their own peril, and upon their own initiative, or whether they would be compelled to apply to this court for formal relief from its operation. Upon this point authorities differ. Some courts

have allowed a party who is proceeded against for contempt, to produce evidence to show why the provisions of the injunction should no longer apply. The weight of authority, however, is to the effect that no disobedience can be allowed, unless formal relief from the operation of the injunction has been granted by the court.

It seems, however, that it would be advisable for Congress to authorize both methods of procedure. This would leave a much larger scope to the initiative of the railroad in promptly adjusting its rates in order to meet new conditions, and it is certain that penalties for contempt would not be severe, where the railroad could show that it had reasonable grounds to believe that it was justified in a departure from the observance of the order of the court. A still better plan, and one which would tend greatly to obviate the danger of a rigid system of court-made rates, would be limitation of the time during which an order of the court should be operative, say to not more than two years.

One other important objection has, however, been raised to the plan which we propose. Certain jurists deprecate the institution of a special court to try a special class of cases, and they fear that such a court might get out of harmony with the rest of the judiciary. But this objection is one of form, rather than of substance. The questions arising from the problem of railway rates are of a peculiar and special character. In the very nature of things, they require special treatment. The fear that the proposed transportation court and the rest of the Federal courts might get out of harmony, is entirely groundless, for they would deal with different classes of material. Conflict of opinion and jurisdiction would thus be impossible. With regard to the question as to what constitutes a taking of property without due process of law, it is impossible that the proposed transportation court and the Supreme Court should be at variance, for upon that point its decisions

would be subject to review by the Supreme Court. It would be compelled to yield to the ruling of the higher court in just the same way as any other inferior court. Nor could this court and the other courts be at variance as to what constitutes a reasonable rate, for upon this point the transportation court would have original and final jurisdiction, and the other courts would have nothing to say.

In fact, when we take into consideration the peculiar nature of the problem of railway rates, the fact that the property interests involved in the determination of such questions would probably be greater than that of all the other cases combined which come before the Federal courts, and the overcrowded dockets of our courts, as they are now constituted, a special court for the purposes which we have set forth seems almost requisite.

In the plan which has been proposed, we have only attempted to state the broad principles upon which it is believed any system for the public control of rates should be founded. The arrangements of the details of the plan may properly be left to Congress, should a bill embodying these principles ever come before that body. Upon the whole, however, our conclusion is that the least regulation which is consistent with securing equal rights and treatment to the small shipper as against the larger ones, and with the prevention of unjust discrimination and extortion, is the best regulation.

# APPENDIX

# APPENDIX

## THE ACT TO REGULATE COMMERCE

AN ACT to regulate commerce, approved Feb. 4, 1887, and in effect April 5, 1887 (24 Statutes at Large, 379; 1 Supp. to Rev. Stat. U. S. 529), as amended by an act approved March 2, 1889 (25 Statutes at Large, 855; 1 Supp. to Rev. Stat. U. S. 684), and by an act approved Feb. 10, 1891 (26 Statutes at Large, 743; 1 Supp. to Rev. Stat. U. S. 891), and by an act approved Feb. 8, 1895 (28 Statutes at Large, 643; 2 Supp. to Rev. Stat. U. S. 369), and by an act approved June 29, 1906 (U. S. Session Laws, 59th Congress, 1st Session, chap. 3591, p. 584), and by a joint resolution approved June 30, 1906 (U. S. Session Laws, 59th Congress, 1st Session, Pub. Res. No. 47, p. 838).

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

SEC. 1 (*As amended June* 29, 1906). That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place

from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "common carrier" as used in this Act shall include express companies and sleeping car companies. The term "railroad," as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term "transportation" shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

No common carrier subject to the provisions of this Act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to

indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge, and boards of managers of such Homes; to necessary care takers of live stock, poultry, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested, persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and any amendment thereof.

From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Any common carrier subject to the provisions of this Act, upon application of any lateral, branch line of railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral, branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money.

SEC. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any par-

ticular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however*, That upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this Act.

SEC. 5. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

SEC. 6 (*Amended March 2, 1889. Following section substituted June 29, 1906*). That every common carrier subject to the provisions of this Act shall file with the Commission created by

this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days' notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates,

fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided*, that wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier."

That in time of war or threatened war preference and precedence shall, upon the demand of the President of the United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic.

SEC. 7. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act.

SEC. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any Act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery

of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

SEC. 10 (*As amended March 2*, 1889). That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.

Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this Act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corpora-

tion or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

SEC. 11. That a Commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this Act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission. (*See section* 24.)

SEC. 12 (*As amended March* 2, 1889, *and February* 10, 1891). That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common

carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpœna the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

The testimony of any witness may be taken, at the instance of a party in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or

proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party, or his attorney, proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

Witnesses whose depositions are taken pursuant to this Act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

SEC. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act in contravention of the provisions thereof,

may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

SEC. 14 (*Amended March* 2, 1889, *and June* 29, 1906). That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

SEC. 15 (*As amended June* 29, 1906). That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through

routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line.

If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section.

The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act.

SEC. 16 (*Amended March 2, 1889. Following section substituted June 29, 1906*). That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent

stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: *Provided*, That claims accrued prior to the passage of this Act may be presented within one year.

In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be *prima facie* evidence of the receipt of such order by the carrier in due course of mail.

The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case

of a continuing violation each day shall be deemed a separate offense.

The forfeiture provided for in this Act shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. The Commission may, with the consent of the Attorney-General, employ special counsel in any proceeding under this Act, paying the expenses of such employment out of its own appropriation.

If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus.

From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determina-

tion over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office, and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts. The provisions of "An Act to expedite the hearing and determination of suits in equity, and so forth," approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney-General in every such case to file the certificate provided for in said expediting Act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes: *Provided*, That no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days' notice to the Commission. An appeal may be taken from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: *Provided further*, That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes.

The copies of schedules and tariffs of rates, fares, and charges, and of all contracts, agreements, or arrangements between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual reports of carriers made to the Commission, as required by the provisions of this Act, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as *prima facie* evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals.

SEC. 16a (*Added June* 29, 1906). That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the original decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order.

SEC. 17 (*As amended March* 2, 1889). That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate

in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpœnas.

SEC. 18 (*As amended March 2*, 1889). [*See Section* 24.] That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission.

SEC. 19. That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or the parties may be promoted, or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United

States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act.

SEC. 20 (*As amended June* 29, 1906). That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act; to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed with the Commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this act shall fail to make and file said annual reports within the time

above specified, or within the time extended by the Commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the Commission it shall be subject to the forfeitures last above provided.

Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment.

Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.

And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such

property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.

SEC. 21 (*As amended March* 2, 1889). That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission.

SEC. 22 (*As amended March* 2, 1889, *and February* 8, 1895). That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free

carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees; and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this act: *Provided further*, That nothing in this act shall prevent the issuance of joint interchangeable five-thousand-mile tickets, with special privileges as to the amount of free baggage that may be carried under mileage tickets of one thousand or more miles. But before any common carrier, subject to the provisions of this Act, shall issue any such joint interchangeable mileage tickets with special privileges, as aforesaid, it shall file with the Interstate Commerce Commission copies of the joint tariffs of rates, fares, or charges on which such joint interchangeable mileage tickets are to be based, together with specifications of the amount of free baggage permitted to be carried under such tickets, in the same manner as common carriers are required to do with regard to other joint rates by section six of this Act; and all the provisions of said section six relating to joint rates, fares, and charges shall be observed by said common carriers and enforced by the Interstate Commerce Commission as fully with regard to such joint interchangeable mileage tickets as with regard to other joint rates, fares, and charges referred to in said section six. It shall be unlawful for any common carrier that has issued or authorized to be issued any such joint interchangeable mileage tickets to demand, collect, or receive from any person or persons a greater or less compensation for transportation of persons or baggage under such joint interchangeable mileage tickets than that required by the rate, fare, or charge specified in the copies of the joint tariff of rates, fares, or charges filed with the Commission in force at the time. The provisions of section ten of this Act shall apply to any violation of the requirements of this proviso.

NEW SECTION (*Added March* 2, 1889) [Sec. 23]. That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and

all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement.

SEC. 24 (*Added June* 29, 1906). That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the Commissioners and the manner of the payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Not more than four Commissioners shall be appointed from the same political party.

(*Additional provisions in Act of June* 29, 1906.) (SEC. 9.) That all existing laws relating to the attendance of witnesses

and the production of evidence and the compelling of testimony under the Act to regulate commerce and all Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act.

(SEC. 10.) That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed; but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

(SEC. 11.) That this Act shall take effect and be in force from and after its passage.

Joint resolution of June 30, 1906, provides: "That the act entitled 'An act to amend an act entitled "An act to regulate commerce," approved February 4, 1887, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission,' shall take effect and be in force sixty days after its approval by the President of the United States."

Public No. 41, approved February 4, 1887, as amended by Public No. 125, approved March 2, 1889, and Public No. 72, approved February 10, 1891. Public No. 38, approved February 8, 1895. Public No. 337, approved June 29, 1906. Public Res., No. 47, approved June 30, 1906.